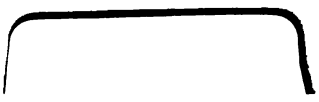

NEW JERSEY EQUITY REPORTS.

VOLUME XV.

McCARTER II.

REPORTS OF CASES

ARGUED AND DETERMINED IN

THE COURT OF CHANCERY,

THE

PREROGATIVE COURT,

AND ON APPEAL IN THE

COURT OF ERRORS AND APPEALS

OF THE

STATE OF NEW JERSEY.

HON. HENRY W. GREEN, CHANCELLOR AND ORDINARY.

THOMAS N. McCARTER, REPORTER.

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HALSTED'S "	- - -	4 "
STOCKTON'S "	- - - -	3 "
BEASLEY'S "	- - -	2 "
McCARTER'S "	- - - -	2 "

A TABLE OF CASES

REPORTED IN THIS VOLUME.

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

N.

P.

R.

S.

T.

V.

W.

Y.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

MAY TERM, 1862.*

HENRY W. GREEN, CHANCELLOR.

THE DELAWARE AND RARITAN CANAL AND CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANIES *vs.* THE CAMDEN AND ATLANTIC RAILROAD COMPANY, THE RARITAN AND DELAWARE BAY RAILROAD COMPANY, and others.

The complainants have, by virtue of their contract with the state of New Jersey, the exclusive franchise of transporting passengers and freight, by railway, across the state, between the cities of New York and Philadelphia, and are entitled to the protection of a court of equity in the enjoyment of that franchise.

The incorporation of the Camden and Atlantic Railroad Company to construct a railroad across the state from Camden to the sea and the incorporation of the Raritan and Delaware Bay Railroad Company to construct a railroad from Raritan bay to Cape Island were no violation, on the part of the state, of its contract with complainants.

The junction of these two railroads at their necessary and legitimate

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* For the other cases decided at this term, see Vol. I, page 320.

points of intersection, so as to form, with the aid of steamboats on the Delaware river and Raritan bay, a continuous line, which, by possibility, may be used for the transportation of passengers and merchandise across the state, between the cities of New York and Philadelphia, constitutes no violation of the complainants' rights.

There being a legitimate purpose for what these roads may be constructed and used, and for which a junction between them may be formed, the defendants cannot be restrained from effecting such junction, merely because it may be perverted to an unlawful purpose.

The fact that either of said roads, or the connection between them, is being constructed without lawful authority, constitutes no ground for equitable relief against said construction at the instance of the complainants, unless their rights will be thereby violated.

The answers of the defendants held to be a full denial of the equity of the complainants' bill, and although such unauthorized construction and connection of the roads may afford evidence of a fraudulent design to violate the rights of the complainants, it is not sufficient, on a motion for a preliminary injunction, to overcome the answers of the defendants.

No duties imposed upon the defendants by their charters, and no contract into which they may have entered with third persons, or with each other, can justify any violation of complainants' rights, or afford protection against the consequences of such violation.

This case came before the Chancellor on the hearing of a rule to show cause why a preliminary injunction should not be granted on a bill filed by complainants, by which they seek to be protected in the enjoyment of certain franchises and privileges granted to them by the state of New Jersey.

The complainants ask that an injunction should issue to prevent the formation, by the defendants, of a continuous line of conveyance by railroad from the Delaware river to Raritan bay, by a junction of their respective roads, which might be used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business between the said cities with the railroads of the complainants, or that might in any manner be used or intended to be used for the purpose of defeating the true intent of the contracts made by the state with the complainants, to protect, until the first day of January, 1869, the business of the complainants' railroad from competition between the cities of New York and Philadelphia.

The exclusive privileges claimed by the complainants depend mainly upon the acts of March 2d, 1832, and of March 16th, 1854. By the second section of the act of 1832, it is enacted, "that it shall not be lawful, at any time during the said railroad charter, to construct any other railroad or railroads in this state, without the consent of said companies, which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative."

By the preamble of the act of 1854, it is recited, that by reason of existing contracts between the state and the companies, as set forth in their acts of incorporation and other acts in relation to the said companies, they are possessed of certain exclusive privileges, which prevent the construction, except by their consent, of any other railroad or railroads in this state which shall be intended or used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroads of the said companies. And by the first section of the act it is enacted, that it shall not be lawful, before the 1st day of January, 1869, to construct any other railroad or railroads in this state, without the consent of the said joint companies, which shall be used for the transportation of passengers or merchandise between the cities of New York and Philadelphia, or to compete in business between the said cities with the railroads of the said joint companies, or that may in any manner be used or intended to be used for the purpose of defeating the true intent of the act passed March the 2d, 1832, or of this act, which intent and meaning are hereby declared to be fully and effectually to protect, until the 1st day of January, 1869, the business of the said joint companies from railroad competition between the cities of New York and Philadelphia.

The Camden and Atlantic Railroad Company, one of the corporations who are made defendants, by virtue of their charter, granted on the 17th of March, 1852, have construct-

ed a railroad from the city of Camden through the counties of Camden and Atlantic, a distance of about sixty miles, to the ocean at Absecom inlet, in the county of Atlantic.

The Raritan and Delaware Bay Railroad Company, the other defendant corporation, by virtue of their charter, granted on the 3d of March, 1854, and of the supplements thereto, were authorized to construct a railroad from some suitable point on Raritan bay, eastward of the village of Keyport, in the county of Monmouth, through the counties of Monmouth, Ocean, Burlington, Atlantic, and Cape May, to Cape Island, on the Atlantic ocean; the general course of the route of the road, as prescribed in the charter, being nearly parallel with the line of the sea coast, and in its direct course crossing the Camden and Atlantic railroad nearly forty miles from Philadelphia. At the time of filing the complainants' bill this road was in the course of construction, and it is alleged, in the bill, that the company are not constructing their road on the route prescribed by their charter, but that the road is made to diverge ten miles to the westward of the direct route to May's Landing, one of the points in the prescribed route, to Atsion, near the extreme northwest corner of the county of Atlantic, for the purpose of approaching nearer to the city of Philadelphia, and by means of a connection with the Camden and Atlantic road, formed by a branch road from Atsion to Jackson, forming a continuous and convenient railroad line to Camden, and thereby interfering with the chartered rights of the complainants. It is not suggested that the granting of these charters, or either of them, by the legislature, or that railroads constructed in accordance with the route prescribed in these acts of incorporation, constitute any violation of the contract made by the state with the complainants; but the complaint is, that the junction thus illegally attempted to be formed between the roads of the defendants, much nearer to the city of Philadelphia than was contemplated or authorized by their charters, will open a communication by railroad and steamboat between the cities of New York and Philadelphia, which will

compete in business with the complainants' railroad, and thereby infringe their chartered rights.

The Camden and Atlantic company, by their answer, alleged that they were authorized to construct a branch road from some convenient point on their main road, to be determined upon by the company, to Batsto, in the county of Burlington; that they located their branch railroad from Jackson station, on the main line of their road, to a point near Atsion (which branch constitutes the connecting link of the two roads of the defendants); that the terminus of the Batsto branch at Jackson is the most convenient and proper point on their railroad from which to make a branch solely for a local road; that it is the most practicable route for the said branch, so far as the topography of the country is concerned; and that the branch was so located, because it was supposed that such location will best promote the interest of the stockholders and of the people of the counties through which the road passes, and will best answer the design of the legislature in authorizing such branch. They admit that an additional reason for thus locating the Batsto branch through Atsion was, that thereby a nearer and more direct communication will be opened between Batsto and the city of New York and points in the line of the Raritan and Delaware Bay railroad. They do not admit, nor do they deny that the controlling reason for that location of the Batsto branch was to aid the Raritan and Delaware Bay Railroad Company in their purpose of approaching nearer to the city, and by means of a connection with the Camden and Atlantic road, forming a continuous and convenient line to Camden.

The Raritan and Delaware Bay Railroad Company, and the president and other officers of the company, by their answer, among other things, admit that at the time of obtaining from the legislature their act of incorporation, no person interested in the application for said road had any intention of constructing a railroad to transport passengers or merchandise between the cities of New York and Phila-

delphia. They admit that the road, as constructed, diverges about ten miles from the direct route to May's Landing, but say, that the location by way Atsion, as at present located, is the most feasible, expedient, and proper location for the railroad contemplated in the act of incorporation, and that the direct route from Squankum to May's Landing was surveyed by direction of the company, and found to be impracticable, and that the terminus of the Batsto branch (which forms the connecting link between the two roads) at Jackson is the most convenient and proper point on the Camden and Atlantic road from which to make a branch solely for a local road. They deny that any agreement has been made, or is intended to be made, for the transportation of freight or passengers between the cities of New York and Philadelphia. They admit that they and the Camden and Atlantic Railroad Company have in view the construction and perfecting, by means of their respective railroads and a convenient connection between them, of a continuous and convenient line of railway communication across New Jersey, from the city of Camden to Port Monmouth; but they deny that they, or any of them, have in view the continuation of said line, at either end thereof, by steamboat transportation to the cities of New York and Philadelphia, for the purpose of using the same for the transportation of passengers or merchandise in a manner which will violate any contract between the state and the complainants or any provisions of the acts of the legislature referred to in the complainants' bill. They also deny that any contract or arrangement made by them is calculated or intended to form a continuous line of railway communication between the said cities to compete in business with the business of the complainants contrary to their vested rights. They admit that it is possible, if not prohibited by law, that a line of communication by railroad and steamboat between the cities of New York and Philadelphia might be opened; but they say that their railroad is not a public highway, and cannot so be used without their concurrence and consent; and as they have made no arrangement whatsoever so to use the

same, and do not intend any unlawful use of their road, such use, if unlawful, cannot be made, and if attempted, can be restrained by the courts. They also deny that they intend in any way to violate the chartered rights of the complainants, or that they *intend during their existence to violate any of the alleged exclusive privileges of the complainants.* And the defendants, all and each of them, declare that it is not and never has been their intention, by the construction of their railroad, or its connections with the Camden and Atlantic railroad or otherwise, to interfere with the complainants' chartered rights by competing with the railroad of the complainants by the transportation of passengers or merchandise between the cities of New York and Philadelphia or otherwise.

The answers having been filed, and affidavits taken touching certain allegations in the answers, the case was heard upon a motion for a preliminary injunction, as prayed for in the bill, to restrain the defendants from forming the proposed junction between their respective roads.*

J. P. Stockton and *Bradley*, for complainants.

Williamson and *Zabriskie*, for defendants.

THE CHANCELLOR. The necessity for an immediate decision of this cause has allowed no opportunity for the preparation of an extended opinion. But the thorough research and elaborate arguments of counsel (for which I acknowledge my indebtedness) have satisfied me as to the principles which must be recognised, and the conclusions which must be adopted in the disposition of the motion now before the court. Those principles and conclusions I shall therefore now state, without any attempt to present in detail the reasons upon which they are founded.

1. The complainants have, by virtue of their contract

* See the same case reported in 1 McCarter 445.

with the state of New Jersey, the exclusive franchise of transporting passengers and freight by railway across the state, between the cities of New York and Philadelphia, and are entitled to the protection of a court of equity in the enjoyment of that franchise.

2. There is no sufficient evidence in the cause that the rights which the complainants, by their bill, seek to maintain have been impaired or relinquished by consent, or the complainants' right to protection forfeited by acquiescence in the acts of the defendants.

3. The incorporation of the Camden and Atlantic Railroad Company to construct a railroad across the state from Camden to the sea, at or near Absecom inlet, and the incorporation of the Raritan and Delaware Bay Railroad Company, to construct a railroad from Raritan bay to Cape Island, were no violation on the part of the state of their contract with the complainants.

4. The junction of the Camden and Atlantic railroad with the Raritan and Delaware Bay railroad, at their necessary and legitimate point of intersection, so as to form a continuous, though circuitous line of railway from Camden to the Raritan bay, and which, with the aid of steamboats upon the Delaware river and Raritan bay, will form a continuous line, and which by possibility may be used for the transportation of passengers and merchandise across the state, between the cities of New York and Philadelphia, constitutes no violation of the complainants' rights.

5. There is a legitimate purpose for which these roads, thus united, may be used, *viz.* the transportation of freight and passengers, to and from points and places within the state of New Jersey, along the line of the respective roads, and between those points and the cities of New York and Philadelphia respectively.

6. There being a legitimate purpose for which these roads may be constructed and used, and for which a junction between them may be formed, the defendants cannot be re-

strained from effecting such a junction merely because it may be perverted to an unlawful purpose.

7. The fact, that either of the said roads, or the connecting link between them, is being constructed without lawful authority, either because no survey of the route has been filed in the office of the secretary of state, or because it is not constructed in conformity to the route prescribed by its charter, constitutes no ground for equitable relief against such construction at the instance of the complainants, unless their rights will be thereby violated.

8. Such unauthorized construction and connection of the roads may afford evidence tending to show a fraudulent design, on the part of the directors, to violate the rights of the complainants; but it is not sufficient, upon a motion for a preliminary injunction, to overcome the answers of the defendants under their corporate seals, and under the oaths of their officers, who are made defendants for the purpose of discovery.

9. Under the view taken by the court of the true construction to be given to the contract between the state and the complainants, the answer of the defendants is a full denial of the equity of the complainants' bill, and renders the allowance of an injunction before the final hearing improper.

10. If the roads of the defendants, by means of the contemplated connection, should be used for the purpose of transporting passengers or merchandise between the cities of New York and Philadelphia, or to compete in business with the railroads of the complainants between the said cities, in violation of the contract between the state and the complainants, full and adequate protection to the complainants' rights can be given by injunction restraining such use of the roads.

11. No duties imposed upon the defendants, in the prosecution of their legitimate business, by their acts of incorporation, and no contract into which they may have entered or may enter with third persons or with each other, can

justify any violation of the rights of the complainants, or afford protection against the consequences of such violation.

12. The state is no party to this suit. Her sovereignty cannot be trenched upon, nor her right of eminent domain impaired by any decision in this cause, nor by any unauthorized or illegal acts which may be done or permitted by the defendants under color of her authority.

13. If the roads of the defendants, by means of the connection that may be made between them, either lawfully or unlawfully, shall be fraudulently used in violation or evasion of the sovereign rights of the state, she has the power, and is fully competent to guard those rights.

The application for an injunction must be denied, and the rule to show cause discharged with costs.

THE SUPERINTENDENT AND TRUSTEES OF PUBLIC SCHOOLS IN TRENTON *vs.* SAMUEL HEATH and others.

On a bill of interpleader, filed by the complainants against several claimants of the same fund, which fund consisted of a debt due from complainants to a contractor on a building contract, and the object of the bill was to settle and adjust the rights of the several claimants, who are creditors of the contractor, and who presented three classes of claims—

1. Those which are for labor done and materials furnished in the erection of the building, and for which the creditor proceeded to secure his claim by demand and notice under the third section of the mechanics' lien law.
2. Claims of the same character for which the contractor drew orders on the complainants, and which were presented to complainants, but not accepted.
3. Claims for debts due from the contractor other than for work done and materials furnished in the erection of the building, and for which the debtor drew orders upon complainants, which were presented, but not accepted—

Held, that the first class of claimants must be paid in the order and priority in which notice of the demand and refusal was given to the complainants. This is clearly in accordance with the provisions of the third section of the lien law, which gives to each claimant a lien on the amount due from the owner to the contractor at the date of the notice; and it

would seem necessarily to give priority to each claimant in the order of time in which his notice is served, and excludes the idea of a *pro rata* division of the fund among the claimants.

Claims of the second class have no claim on the fund under the provisions of the third section of the lien law. The statutory remedy must be strictly pursued. The statute alters the existing law only so far as its terms require. It cannot be extended by construction. The second and third class of claims are undistinguishable in principle, and stand on the same legal footing.

The orders drawn by the contractor upon the fund in the hands of the complainants, and presented to them, though not accepted, constituted an equitable assignment *pro tanto* of the fund, which will fix the fund in the hands of the debtor, and will be protected and enforced in a court of equity.

Most American courts maintain the doctrine, that a valid assignment cannot be made of *a part* of a debt without the assent of the debtor, which will be enforced against him in a court of law. But it has no application to an equitable assignment sought to be enforced in a court of equity, as against the fund in the hands of the debtor upon whom the order is drawn.

When the debtor has come voluntarily into a court of equity with the fund, and leaves the claims of the contesting parties to be settled between themselves, it does not lie in the mouth of either of the claimants to raise the objection against the assignment of part only of the debt. The presumption must be that the complainants assented to a subdivision of the debt.

All the claimants, as well those whose debts were not on account of the building as those whose debts were contracted in the erection of the building, are entitled to be paid out of the fund, according to the priority of their respective orders and notices.

The parties who have made demand and given notice under the statute are entitled to no priority. The statute confers on mechanics and material men no exclusive or superior right to the fund in the hands of the owner. Each creditor is entitled to be paid in the order in which his notice or order was presented to the complainants.

The controversy in this case arose out of the erection of a public schoolhouse in the city of Trenton. The complainants, for whom the building was erected by contract by Henry C. Scott, were indebted to him in the sum of $632.40. Conflicting claims having been made upon the complainants by creditors of Scott, amounting to about $1150, the complainants paid into court the money due from them to Scott, and filed a bill of interpleader against the claimants.

An order of reference was made to a master to ascertain and report the amount of the debt due to Scott from the complainants, and the respective amounts of the several claims of the defendants, and their order and priority.

The case was heard on exceptions to the master's report.

Beasley, for lien claimants.

E. W. Scudder, for Heath and others.

An order by the debtor in favor of the creditor upon the complainants, and notice to them by presentment, is an appropriation and an equitable assignment *pro tanto*, and the funds are held by the notice. *Watson* v. *Duke*, 1 *Russ. & M.* 602, *note* 1; *Burn* v. *Carvalho*, 4 *M. & C.* 690; *Phillips* v. *Stagg*, 2 *Edw. Ch.* 108; *Hawley* v. *Ross*, 7 *Paige* 103; *Richardson* v. *Rust*, 9 *Ibid.* 243; *Ex parte South*, 3 *Swanst.* 343; *Morton* v. *Naylor*, 1 *Hill* 583, *note a*, 585; *Wheeler* v. *Wheeler*, 9 *Cowen* 34; *Pattison* v. *Hull*, *Ibid.* 747; *Field* v. *Major*, 2 *Selden* 179; 3 *Lead. Cas. in Eq.* 308, 354–5.

There is a distinction at law between a partial and entire assignment. 5 *Wheaton* 283; 1 *Ibid.* 235; 5 *Pet.* 598.

Contra to above cases, *Quinn* v. *Hanford*, 1 *Hill* 82; *Luff* v. *Pope*, 5 *Ibid.* 413.

THE CHANCELLOR. The complainants being indebted to Henry C. Scott, upon a building contract for the erection of a public schoolhouse in the city of Trenton, and there being a variety of conflicting claims, legal and equitable, to portions of said fund, exceeding in the aggregate the amount of their indebtedness, the complainants filed a bill of interpleader, and paid the fund into court, in order that the rights of the several claimants might be adjusted and settled.

By the master's report, it appears that the amount paid into court by the complainants, $632.40, is the whole amount of the indebtedness from the complainants to Scott upon the building contract.

There are a large number of small claims upon the fund,

amounting together to about $1150. Scott, the contractor, is insolvent. A large portion of the indebtedness must be lost. The question is upon whom the loss must fall. The claims are all made by creditors of Scott, the contractor, and consist of three classes.

1. Those which are for work and labor done and materials furnished in the erection and construction of the said building, and for which the creditor proceeded to secure his claim by demand and notice under the third section of the mechanics lien law. *Nix. Dig.* 524.

2. Claims of the same character, for which the contractor drew orders upon the complainants, which were presented to the superintendent of schools, but were not accepted by the complainants.

3. Claims for debts due from the contractor, other than for work done and materials furnished in the erection and construction of said building, and for which the debtor drew orders upon the complainants, which were presented to the superintendent, but not formally accepted.

The master has reported in favor of the first class of claimants to be paid in the order and priority in which notice of the demand and refusal was given to the superintendent. To this part of the report there is no exception. It is clearly in accordance with the provisions of the third section of the mechanics' lien law. The third section of that statute, whatever the design of the framers may have been, gives to each claimant a lien upon the amount due from the owner to the contractor at the date of the notice; and it would seem necessarily to give priority to each claimant in the order of time in which his notice is served, and excludes the idea of a *pro rata* division of the fund among the claimants.

The master has also reported that the claims included in the second class are entitled to be paid in like order and priority, and has excluded the claims in the third class. The report in each of these particulars is excepted to. It is insisted, on the one hand, that the master erred in distinguishing between these classes of cases, and that both classes

of claims should have been rejected, and on the other hand that both should have been allowed.

There would seem, at first view, to be sound reason for the distinction; and looking to the policy of the statute, which gives to the journeyman, laborer, and material man, after a refusal by the contractor to pay his debt, and notice to the owner of the demand and refusal, a claim upon the amount due from the owner to the contractor, that he should have at least an equally strong claim in case the indebtedness is admitted by the contractor, and an order given upon the builder to pay the amount. It must be borne in mind, however, that the statutory remedy must be strictly pursued; that the statute alters the existing law so far, and no further than its terms require, and that it cannot be extended by construction. Whatever seeming justice there may be, therefore, in admitting the validity of the claim in this aspect, it is not warranted by the statute, and would be as inconsistent with its terms as a division of the fund among all the claimants *pro rata* upon the ground that such division would conform more strictly to the general policy of the act.

I think the second and third class of claims are undistinguishable in principle, and both stand upon the same legal footing. Both must be admitted or both rejected.

Before considering these exceptions, it is proper to premise that this suit has been amicably conducted; that no technical or formal objections have been suggested or relied upon, and that the sole design of the parties has been to present for consideration the simple inquiry, to whom, and in what order and priority, the fund should be paid.

The only inquiry therefore is, whether the orders drawn by the contractor upon the fund in the hands of the complainants, and presented to the superintendent, though not accepted by him, constituted an equitable assignment *pro tanto* of the fund.

I present the question in this form, because it is quite clear that if there was an express acceptance, written or oral,

of the order by the complainants the case would be free from all doubt, and because there is, to my mind, no satisfactory evidence in the case that any of these orders were accepted by the complainants. Some of the claimants do indeed testify that their orders were accepted by the superintendent, and that he promised to pay them. But this is expressly contradicted by the superintendent, who denies that he ever accepted or promised to pay any of the orders. He simply stated that there was a debt due from the complainants to the contractor, and permitted the parties to leave the orders with him. In this he is confirmed by a number of the parties while testifying in their own behalf. I am the more confirmed in this view of the evidence from the fact that the superintendent had not authority either to accept the orders or to promise to pay them. He could not, without express authority for that purpose, thus bind the corporation. The case will be regarded, therefore, as if there was no acceptance by the complainants or promise on their part to pay any of the orders.

The simple inquiry then is, whether an order by the creditor, drawn upon and presented to his debtor to pay a sum of money out of a specified fund, constitutes in favor of the payee an equitable assignment of the debt, which will fix the fund in the hands of the debtor, and which will be protected and enforced in a court of equity. It does not appear to me that the question admits of a doubt.

In *Yates* v. *Groves*, 1 *Vesey* 280, one Dawson, being indebted to the plaintiff, drew his order upon Groves and Dickinson, in favor of the plaintiff, to pay the amount due out of the fund of Dawson in the hands of Groves and Dickinson. Dawson, having become bankrupt, the entire fund in the hands of Groves and Dickinson was claimed by the assignee in bankruptcy. Upon a bill filed for the recovery of the amount covered by the order, Lord Thurlow said: "This is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer, he has done it, and it being his own

money, he could transfer. The transfer was actually made. They were in the right not to accept, as it was not a bill of exchange. It was not an inchoate business. The order fixed the money the moment it was shown to Groves and Dickinson."

The principle is thus stated by Mr. Justice Story: "If a draft or order is drawn on a debtor for *a part* or *the whole* of the funds of the drawer in his hands, such a draft does not entitle the holder to maintain a *suit at law* against the drawee, except the latter assent to accept or pay the draft." "But the transaction will have a very different operation *in equity*. Thus, for instance, if A., having a debt due to him from B., should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of *a part* of such debt. In such case a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it." 2 *Story's Eq. Jur.*, § 1043–4.

The authorities in support of the principle are very numerous; nor, so far as it applies to an order for the payment of the *entire debt*, does there seem to be any conflict in the authorities.

In *Mandeville* v. *Welch*, 5 *Wheat.* 277, Mr. Justice Story himself says, in apparent contradiction to the text of his treatise just cited: "In cases where the order is drawn on *the whole* of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hand. But where an order is drawn, either on a general or a particular fund, for *a part only*, it does not amount to an assignment of that part, or give a lien as *against the drawee*, unless he consent to the appropriation by an acceptance of the draft: or an obligation may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. The reason of the principle is plain—a creditor

shall not be permitted to split up a single cause of action into many actions without the assent of the debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he should be obliged to pay in fractions to any other persons; so that if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the *present suit.*" That suit was an *action at law* by the drawer of the order for the use of the payee against the debtor upon whom the order was drawn. All this reasoning applies to such an action. It presents most clearly and forcibly the ground of the doctrine maintained by most of the American courts, that a valid assignment cannot be made of part of a debt without the assent of the debtor which will be enforced against him in a court of law. But it has no application whatever to an equitable assignment, sought to be enforced in a court of equity as against the fund in the hands of the debtor upon whom the order is drawn.

In *Tieman* v. *Jackson* (5 *Peters* 580), which was also an action at law brought in the name of the payee, the point mainly discussed and decided was, whether the evidence showed such a legal right in the plaintiff that the action would lie in his name; and Mr. Justice Story, in alluding to his opinion in *Mandeville* v. *Welch*, said, that the suit was there brought in the name of the original assignor for the use of the assignee against the *debtor*, and it was unnecessary to consider whether the remedy, if any, was at law or in equity.

The same principle is maintained in *Hopkins* v. *Beebe*, 2 *Casey* 85, where the question arose under similar circumstances.

But whatever difficulty, either at law or in equity, this

objection might present, in an action brought by the assignee of a part of the debt against the debtor, where there had been no presentment or acceptance of the order, it can have no force in the present case. Here the debtor has come voluntarily into court with the fund, and leaves the equitable claims of the contesting parties to be settled between themselves, according to the principles and practice of a court of equity. It does not lie in the mouth of either of the claimants to raise the objection. The presumption must be that the complainants assented to a subdivision of the debt, whatever their original contract may have imported.

All the claimants, as well those whose debts were not for materials, or work and labor furnished or done in the erection of the building, as those whose debts were on account of the building, are entitled to be paid out of the fund according to the priority of their respective orders. The parties who have made demand and given notice under the statute are entitled to no priority. The statute confers upon the mechanics and material men no exclusive or superior right to the fund in the hands of the owner. Each creditor is entitled to be paid in the order in which his notice or order was presented to the complainants.

The master's report must be corrected accordingly.

THE STONINGTON SAVINGS BANK *vs.* DAVIS and others.

In a suit for the foreclosure of a mortgage, which contained an agreement that the mortgagor should keep the buildings insured, and assign the policy to the mortgagees, and in default of so doing, the mortgagees might effect such insurance, and that the premium paid thereon should be a lien on the mortgaged premises, and added to the amount secured by the mortgage and payable on demand with interest, an order of reference was made to a master to take an account of the amount due to complainants. The master reported, allowing, in addition to the amount due on the mortgage, a sum of money due for premiums paid by

the mortgagees on effecting insurances on the buildings.—On exceptions to the master's report, it was *held*, that the amount so allowed for insurance was not within the cognizance of the master. The master's authority, as to the subjects and extent of his examination and report, is limited and controlled by the order of reference.

The order of reference in this case is in the usual form, directing the master to take an account of the amount due to the complainants upon their bond and mortgage. The sum paid for insurance is no part of the amount due on the bond and mortgage.

When neither the complainants' right to insure, nor the fact of the insurance is averred in the bill, and no relief is prayed on that account, the amount paid for insurance should not be allowed, although, by a liberal construction of the order of reference, it might be deemed within the cognizance of the master.

This case came before the court on exceptions to the master's report, made on an order of reference in pursuance of an interlocutory decree in the principal case, which is reported in Vol. I, p. 286.

Ransom, for defendant, in support of the exceptions.

Gilchrist, for complainant, contra.

THE CHANCELLOR. The first exception is, that the master has charged the exceptant with $24.98, insurance premiums, alleged to have been paid for insuring the buildings upon the mortgaged premises. The bill is for foreclosure. The mortgage which is sought to be foreclosed, besides the usual clauses, contains an agreement between the parties that the mortgagor should keep the buildings upon the premises insured against loss or damage by fire in an amount approved by the mortgagees, and assign the policy to them; and in default thereof, that the mortgagees might effect such insurance, and that the premiums paid for effecting the same should be a lien on the mortgaged premises, added to the amount of the bond, and secured by the mortgage payable on demand, with interest.

The matter excepted to was not within the cognizance of the master. The master's authority, as to the subjects and

extent of his examination and report, is limited and controlled by the order of reference. *Gordon* v. *Hobart*, 2 *Story's R.* 260; *Remsen* v. *Remsen*, 2 *J. C. R.* 501; *Harris* v. *Fly*, 7 *Paige* 421; *Torrey* v. *Shaw*, 3 *Edwards* 356.

The order in this case is in the usual form, directing the master to take an account of the amount due to the complainants upon their bond and mortgage. The sum paid for insurance is strictly no part of the amount due on the bond and mortgage. By the terms of the agreement, it is to be a lien on the mortgaged premises, and to be added to the amount due on the bond, and secured by the mortgage.

If, by a liberal construction of the terms of the order, this subject might be deemed within the cognizance of the master, there is a more fatal objection to the report in this particular. It appears, by the master's report, that part of the money advanced by the complainants for insurance was paid before the filing of the bill of complaint.

The bill contains no averment whatever that any premium for insurance had been paid by the complainants, or that the defendant had failed to insure. For all that appears, the mortgagor may have fully insured the buildings upon the premises, and assigned the policy to the complainants. Neither the complainants' right to insure nor the fact of insurance is averred in the bill, or put in issue by the pleadings, nor is any relief prayed in regard to it. In *Gordon* v. *Hobart*, 2 *Story's R.* 343, where waste was not charged in the bill, and no authority to examine that question had been given to the master in the order of reference, but the master, with the *consent of the parties*, had examined and reported upon the question of waste, it was held, by Justice Story, that such consent gave the master no jurisdiction, and that the whole proceedings as to the waste were irregular and *coram non judice*. The claim of the complainants for the amount paid for insurance is probably just, and I regret to disturb the report upon a ground that may savor of technicality; but so clear a principle cannot be violated with im-

punity without danger of the total subversion of all correct practice.

The second exception is, that the master allowed the complainants a larger amount for taxes than ought to have been allowed.

This exception is not sustained. It was not insisted on by the exceptant at the hearing.

The first exception is allowed. The report will be corrected accordingly, by striking from the amount reported to be due to the complainants the amount paid for insurance. The order will be made without costs on either side.

ROBERT C. STOUTENBURGH, ELIHU DAY, and JOHN H. REOCK *vs.* JACOB D. KONKLE and others.

On a bill, filed by a judgment creditor against the debtor and other prior judgment creditors of the same debtor, alleging that the debt for which complainants' judgment was entered was fraudulently contracted by the debtor, in purchasing goods of complainant with intent to subject them to the lien of the execution of the defendant's relatives having claims against him, and claiming that complainant is entitled to have the articles so purchased specifically applied to the satisfaction of his judgment, it was *held*—

That complainant's case must rest upon the ground of fraud in the purchase of the articles from complainants which vitiated the contract, and prevented any change in the ownership of the chattels; and that to sustain the case upon this ground, the articles must have been purchased with the purpose of defrauding the complainant, or the credit must have been obtained by false and fraudulent representations of material facts calculated to mislead the complainant, and upon which he acted in the sale of the goods.

If the debtor purchased the goods of complainant with the fraudulent design of subjecting them to the executions of his near relations and other friends having claims against him, however just, it affords a clear case for equitable relief.

A purchaser gains no title, and acquires no right of retaining goods, if he obtain possession by gross fraud under color of purchase, whether on credit or otherwise.

When goods are sold for cash on delivery, if the purchaser, on delivery of

the goods and demand of payment, refuses to pay the purchase money, it is competent for the vendor at once to reclaim the goods, and seek the protection of a court of equity against judgment creditors of the vendee. In such a case no title passes. The condition of the sale is violated.

If an insolvent purchaser, concealing his insolvency from the vendor, procures goods without intending to pay for them, the property in the goods will not be changed.

When, however, the vendor does not disaffirm the contract and reclaim the goods as his own, but on the failure and absconding of the vendee, issues an attachment against him for the debt, and afterwards obtains judgment by confession against him, and seeks to enforce the judgment by claiming an equitable lien on the goods sold, that is an affirmance of the contract, and there is no principle on which the complainant is entitled to that relief against prior judgment creditors of the vendee when executions have been levied on the goods.

On filing the bill in this cause, a rule was granted that defendants show cause why an injunction should not issue according to the prayer thereof.

Runyon, for complainant, cited *Hilliard on Sales* 328, *ch.* 20.

Linn, for defendants, cited *State* v. *Vanderbilt,* 3 *Dutcher* 328.

THE CHANCELLOR. The complainants are dealers in household furnishing articles in the city of Newark. At the time of the transactions complained of, Jacob D. Konkle was lessee for years of the City Hotel in said city. Between the twenty-second day of March last and the nineteenth day of May, inclusive, they sold to said Konkle, one of the defendants, a bill of goods amounting to $2796.81. At the time the articles were furnished, Konkle was the occupant of the hotel, and the articles were purchased and used for the purpose of furnishing the house. The larger portion of the bill was sold for cash on delivery of the articles, the balance on a credit of three months. On the twenty-third day of July, Konkle gave three bonds with warrants of attorney to confess judgment; one to his mother-in-law, Mary

Pierson, conditioned for the payment of $1690.86, one to his father, John Konkle, conditioned for the payment of $1132, and one other to Ira C. Moore, conditioned for the payment of $710. The bonds are all made payable on demand. On the twenty-fourth day of July, judgments were entered upon the said bonds, executions thereon issued, and placed in the hands of the sheriff; the property of the defendant, including the articles purchased of the complainants, levied upon; the goods advertised for sale on the fifth of August, and the hotel closed. Immediately on the entry of the said judgments, Konkle absconded from the city of Newark, and concealed himself from his creditors. On the twenty-fifth of July, the complainants sued out a writ of attachment against Konkle, as an absconding debtor, for the amount of their claim, and caused the same to be served upon the goods and chattels levied upon by virtue of said executions. On the thirtieth of July, Konkle confessed a judgment to the complainants for $2431.88, the balance of their claim, $400 having been paid thereon. Upon the entry of the last named judgment, the attachment was discontinued, and an execution issued upon the judgment, and levied upon the said personal property of the defendant.

The bill charges that the goods were sold and delivered to Konkle, on the faith of false and fraudulent representations made by him, that he had $6000 in cash; that he owned a farm in the county of Warren, worth $12,000, which was subject to encumbrances amounting to $6000 only, and that he owned a span of horses worth $1000; that previous to confessing the said judgments he sold the horses, and at the time of confessing the first named three judgments, he conveyed the farm to his father for the alleged consideration of $7000, and that he now professes to be entirely without property, excepting that which is levied upon under said judgments; that the goods sold by the complainants are readily distinguishable from the other goods levied upon under said judgments, and that in equity the complainants have a lien upon them superior to the claim of the plaintiffs in the other

three judgments confessed by Konkle, and also superior to the claim of the landlord of the premises, in which the goods are, for rent claimed to be due by him, and who claims, by reason thereof, to have a lien upon the said goods.

The bill further charges, that the goods so levied upon will not, at sheriff's sale, bring enough to pay the amount of the said three judgments first confessed by Konkle, and that, in equity, the goods so sold by the complainants to Konkle, or so much thereof as may be necessary for that purpose, should be decreed to be delivered to them on account of their judgment, and that, by reason of fraud in the first named three judgments, those judgments should be postponed to the complainants' judgment, so far as may be necessary for the payment of any balance that may remain unsatisfied out of the goods sold by the complainants, by reason of the carrying away or disposing of any part thereof by the defendants.

The bill prays a discovery of the consideration of the three first named judgments; the object or design of confessing the same; whether it was not for the purpose of hindering, delaying, or defeating the claims of the complainants and other creditors of Konkle; and that the complainants may be decreed to have a priority in the payment of their judgment over the other judgments confessed by Konkle, and to have a lien, to be enforced under the direction of the court, upon the goods so sold by the complainants to Konkle for the balance due them for the purchase money of said goods prior to the lien of the said first three named judgments and executions, and prior to the claim of the landlord for rent; that the goods may be decreed to be delivered up to the complainants to satisfy the balance due them, and if there be not sufficient for that purpose, that the complainants may be decreed to have the deficiency satisfied, and paid out of the other goods levied upon, before the payment of the prior judgments; that the said three judgments may be set aside as fraudulent, and that an injunction may issue restraining the sheriff from proceeding to a sale of the goods

levied upon by virtue of the executions issued on said judgments, and also restraining the landlord from distraining upon said goods sold by complainants for rent due, or claimed to be due.

The bill is filed with two different aspects, and seeks corresponding remedies—

1. It charges fraud in the purchase of the articles, and in obtaining credit from the complainants by Konkle, by reason whereof the complainants claim to have a lien upon the articles thus purchased, and a right in equity to have them specifically appropriated to the payment of the purchase money.

2. It charges fraud in the confession of the judgments by Konkle in favor of other creditors, alleging that the said judgments were without consideration, and were confessed for the fraudulent purpose of hindering and delaying the complainants in the recovery of their debt.

It is evident, from the frame of the bill, that the first ground was principally relied upon, and that the second was introduced mainly for the purpose of discovery and as auxiliary to the main design, rather than as a distinct and substantive ground of relief. The charges of the bill, touching the second ground of complaint, were in themselves so general, so deficient in specific charges of fraud, as scarcely to warrant the granting of an injunction upon this ground. Since the granting of the rule to show cause, each of the defendants whose judgment is charged to be fraudulent has answered. By their answer, they disclose the consideration upon which the judgment is founded, deny all fraud, on their part, in the obtaining of said judgments, and all knowledge of any fraudulent purpose on the part of Konkle, by whom the judgment was confessed. On a careful examination of the answers, I see no ground to distrust their truth or fairness. It is clear, therefore, that no injunction can issue upon this ground. It must be assumed, in the consideration of the case, that the plaintiffs, in the judgments which are sought to be impeached by the bill, are *bona fide* creditors of

Konkle, that the judgments are founded upon good consideration, and that they were not confessed with any fraudulent intent or purpose.

The complainants' claim to an injunction must rest, therefore, upon the first and main ground disclosed in their bill, *viz.* that by reason of the fraud practised by Konkle in the purchase of the articles, and obtaining of the credit from the complainants, they are entitled to have the articles thus purchased specifically appropriated to the satisfaction of their judgment. This charge is quite independent of the charge of fraud in the confession of the judgments, and the relief, if granted, will be entirely irrespective of the *bona fides* or *mala fides* of those judgments on the part of the judgment creditors. That the complainants' counsel so regarded it is evident from the fact, that he claims priority not only over the lien of the judgments which are alleged to be fraudulent, but also over the claim of the landlord for rent, the *bona fides* of whose claim is not called in question.

It is not claimed that the vendor of *chattels* has any lien in equity upon the articles sold for the unpaid purchase money. That equitable lien exists only upon the sale of real estate. *Adams' Eq.* 126–7; 2 *Story's Eq.*, § 1222.

The case must rest exclusively upon the ground of fraud in the purchase of the articles from the complainants, which vitiated the contract and prevented any change in the ownership of the chattels. To sustain the case upon this ground, the articles must have been purchased with the purpose of defrauding the complainants, or the credit must have been obtained by false and fraudulent representations of material facts calculated to mislead the complainants, and upon which they acted in the sale of the goods. If Konkle purchased those goods of the complainants with the fraudulent design of subjecting them to the executions of his near relatives and other friends having claims against him, however just, it affords a clear case for equitable relief.

A purchaser gains no title, and acquires no right of retaining goods, if he obtain possession by gross fraud under

color of purchase, whether on credit or otherwise. *Chitty on Con.* 360; *Hilliard on Sales* 328.

A large proportion of these articles were sold for cash on delivery, and had the purchaser, on delivery of the goods and demand of payment, refused to pay the purchase money, it would have been competent for the complainants at once to have reclaimed the goods, and to have sought the protection of a court of equity against judgment creditors of the vendee. In such case no title passed. The condition of the sale would have been violated.

So if an insolvent purchaser, concealing his insolvency from the vendor, procures goods without intending to pay for them, the property in the goods will not be changed.

In *Durell* v. *Haley*, 1 *Paige* 492, where an insolvent confessed a judgment to his friend, and then purchased goods for the purpose of subjecting them to the execution, it was held to be a fraud upon the vendor, and the judgment creditor who had purchased the goods under the execution was not permitted to retain them.

It is sought to bring this case within the operation of these principles. But were these goods originally purchased with the design of defrauding the complainants, or of subjecting them to the execution of his friends who were his creditors? I think the circumstances under which this purchase was made forbid any such conclusion. In December, 1861, Konkle, being then a hotel keeper in Newton, leased the City Hotel in Newark for a term of years, and in March, 1862, he removed into it with his family, and commenced furnishing it for the business for which it was leased. The goods procured from the complainants were purchased and used for the purpose of furnishing the hotel. It is admitted, in the bill, that they were necessary for that purpose. It is apparent, moreover, that the goods purchased of the complainants, a schedule of which is annexed to the bill, constituted but a portion of the furniture of a first class hotel. A large additional amount of furniture must have been purchased or provided, and large additional expenses

incurred to furnish and provide the house for business as a hotel. It is incredible that the defendant should have removed his family to Newark, leased a large hotel, incurred heavy expenses in furnishing it, assumed the payment of a heavy rent, and engaged in a new and expensive business for the purpose of defrauding those of whom he purchased the goods. It seems far more probable that he entered upon an extensive and hazardous business without sufficient capital or business capacity, that he resorted to unjustifiable measures to obtain credit, and that his means proving inadequate, and the business unsuccessful, he attempted to save his immediate friends from the consequences of his failure. Whatever may have been the motives of his subsequent conduct, I think there is no reason furnished by the evidence, or suggested in the bill, for believing that the original purchase by Konkle of the complainants was made with the view of defrauding them, or of subjecting the property purchased to the judgments of his friends.

Nor do the representations made by Konkle, whether true or false in regard to his means, establish the fact that his original purpose in purchasing the property was fraudulent. That he afterwards sold his farm to his father below his own valuation and below its true value; that he sold his horses, and appropriated the proceeds to his own use, may show a design to defraud his creditors, but are not sufficient to show that his original purpose in making the purchase was fraudulent.

But if this view of the evidence be erroneous, admitting that the evidence does show that this purchase from the complainants was made with a fraudulent design, and that the defendant resorted to fraudulent, and even criminal misrepresentations to obtain credit, still I am of opinion that the injunction ought not to issue. It must be borne in mind that the controversy is not between the complainants and Konkle, as to the title to the property, but between judgment creditors of Konkle, as to the appropriation of the property to the payment of their respective debts. Did the property

in question belong to Konkle or to the complainants? If it belonged to Konkle, it is subject to levy and sale by his judgment creditors in the order of their priority. Now admitting all the allegations of the bill in regard to the frauds of Konkle in their fullest extent; admit that by the failure of Konkle to pay for the goods on delivery they had a right to reclaim them; admit that, by his fraudulent misrepresentations to obtain credit, that he acquired no property in the goods, and that they had a right to rescind the contract and reclaim the property, do they now stand in a position to enforce that claim? On the failure of Konkle, and on his absconding, they did not claim the property sold by them as theirs, and call upon this court to protect it from the executions of the judgment creditors of Konkle. They did no act indicating an intention to disaffirm the contract, and to reclaim the property as their own. On the contrary, they sued out an attachment for the recovery of the purchase money of those goods. An affidavit must have been made, as the ground of that attachment, that the purchase money was due to the complainants. A judgment was subsequently entered in favor of the complainants for the same debt; an affidavit must have been again made that the purchase money of those goods was a debt justly and honestly due and owing to the complainants. That judgment the complainants are now seeking to enforce. They ask that the debt shall be satisfied by the appropriation for that purpose of the goods sold by them to Konkle. Instead of disaffirming the contract, and seeking the restoration of the goods as their own property, they affirm the contract, obtain a judgment for the price, and seek to satisfy the judgment by claiming an equitable lien upon the goods sold. I am aware of no principle upon which the claim can be sustained, nor have I met with an authority which will justify the court in enforcing it.

The motion for an injunction must be denied, and the rule to show cause discharged with costs.

LEWIS J. YOUNGBLOOD and WIFE and others *vs.* SCHAMP.

When an injunction is applied for, there should be a special affidavit of the truth of all the material facts upon which the application is founded. An injunction issued upon the common affidavit in the form ordinarily annexed to an answer will be dissolved very much as a matter of course.

The facts need not be proved by the affidavit of the complainant. When the material facts are not within his knowledge, they should be verified by the oath or affirmation of some person who has a knowledge of the facts, or duly verified copies of private instruments or of records may be annexed to the bill when such is the appropriate mode of proof.

In bills charging fraud, and praying a discovery, or in any case where, in the nature of things, positive proof cannot be expected, the additional verification may be dispensed with, and the injunction may issue on the affidavit of complainant founded on belief alone.

If complainant is absent, or his affidavit, for any reason, cannot be procured, it may be sworn to by the attorney of complainant or by any person acquainted with the facts.

Where the bill is filed by a corporation, the officer, or other person who has the principal personal knowledge of the facts, should swear to them.

This bill was filed by Lewis J. Youngblood and others against Henry Schamp and Robert Schamp, executors of Henry G. Schamp, deceased, for an injunction to restrain the defendants from making sale of a farm of their testator, pursuant to an order of the Orphans Court of the county of Hunterdon. The bill was not sworn to by either of the complainants, but was verified by the oath of Mr. James M. Robinson, the solicitor of the complainants, and by copies of the documents referred to in the bill, which were annexed to and filed with the bill, and were duly certified by the surrogate of Hunterdon county.

Mr. Robinson's affidavit stated, as a reason for not procuring the affidavits of the complainants to the bill, that their residence was so remote from where the bill was prepared, that the delay occasioned by procuring their affidavits would have probably defeated the whole object of the bill. On allowing the injunction, the following opinion was prepared by

THE CHANCELLOR. There should be a special affidavit of the truth of the facts upon which the application for an injunction is founded. An injunction issued upon the common affidavit in the form ordinarily annexed to an answer will be dissolved very much as a matter of course. *Eden on Inj.* 377, 380; *Campbell* v. *Morrison*, 7 *Paige* 157.

It is rarely, if ever, that the right to an injunction can rest upon the acts of the complainant, and it is in relation to those, alone, that the affidavit professes to be founded on *knowledge*. As to the acts of all others, it is founded on *belief* only.

It is not necessary that the facts should be proved by the affidavit of the *complainant*. Where the material facts are not within his knowledge, they should be verified by the oath or affirmation of some person who has a knowledge of the facts; or duly verified copies of private instruments or of records may be annexed to the bill, where such is the appropriate mode of proof. *Bank of Orleans* v. *Skinner*, 9 *Paige* 305; *Rule IX*, § 11; *Nix. Dig.* 90, § 15.

There is a class of cases, as for example bills charging fraud, and praying a discovery, where, in the very nature of things, positive proof cannot be expected. In such cases the additional verification may be dispensed with, and the injunction issue upon the affidavit of the complainant, founded on his belief alone. *Attorney General* v. *Bank of Columbia*, 1 *Paige* 511; *Campbell* v. *Morrison*, 7 *Paige* 157.

The bill is usually sworn to by the complainants, or one of them. But if he be absent, or his affidavit for any reason cannot be procured, it may be sworn to by the attorney of the complainant, or by any person acquainted with the facts. 1 *Smith's Chan. Pr.* 595; 3 *Daniell's Chan. Pr.* 1890; 1 *Hoffman's Chan. Pr.* 79; 3 *Ibid.* 18, *No.* 21.

Where the bill is filed by a corporation, the officer or other person who has the principal personal knowledge of the facts should swear to them. 1 *Hoffman's Chan. Pr.* 78; 3 *Ibid.* 18, *No.* 20; *Bank of Orleans* v. *Skinner*, 9 *Paige* 305.

By the English practice, the affidavit cannot be sworn

until after the bill is filed. 1 *Smith's Chan. Pr.* 195; 3 *Daniell's Chan. Pr.* 1890.

A contrary practice prevails in this state. The affidavit is ordinarily made before the bill is filed, and is annexed to and filed with the bill.

The affidavit, in its present form, is not sufficient. The verification should extend to all the material facts upon which the right to an injunction rests.

RINEHART'S EXECUTORS *vs.* WILLIAM RINEHART and others.

In suits brought by executors, the rule in equity is, that only the executors who have proved the will must be parties. An executor who has renounced need not be joined as co-plaintiff.

This was a bill filed by Samuel Rinehart and Peter Rinehart, executors of Adam Rinehart, deceased. It was set forth, in the bill, that by the will of Adam Rinehart, deceased, the complainants and one Jacob Hipp were appointed the executors. The complainants proved the will, and took upon themselves the administration of the estate. Before filing the bill, Hipp, the other executor, filed with the surrogate a renunciation in writing, refusing to administer the estate or to take upon himself any part of the burthen thereof.

To this bill the defendants demurred, on the ground that Jacob Hipp should have been joined as a complainant in the bill.

Van Syckel, in support of the demurrer, cited *Hill's Executors* v. *Smalley*, 1 *Dutcher* 374; *Hensloe's case*, 9 *Coke* 37; 1 *Chitty's Pleading* 13; *Cabell* v. *Vaughn*, 1 *Saund.* 291, *g*; 3 *T. Raymond* 558; *Toller on Executors* 68–9; *Judson* v. *Gibbons*, 5 *Wend.* 224; *Wankford* v. *Wankford*, 1 *Salkeld* 307; *Thompson* v. *Graham*, 1 *Paige* 384; *Offler* v. *Jenner*, 3 *Cha. Rep.* 92; *Ferguson* v. *Ferguson*, 1 *Hayes & J.* 300.

Vleit, contra, cited 1 *Williams on Executors* 241, 242, 4*th Am. ed.*; *Nix. Dig.* 276, § 17; *Potts' Precedents* 56, 57; *Hughes' Eq. Draftsman* 143, *Precedent* 46; *Ibid.* 251 to 253, *Precedent* 80; *Davies* v. *Williams*, 1 *Simons* 5; *Cramer* v. *Morton*, 2 *Molloy* 108; *Thompson* v. *Graham*, 1 *Paige* 384.

THE CHANCELLOR. The demurrer in this case raises the simple question, whether a person appointed an executor, but who has renounced the executorship, is a necessary party to a suit in equity.

At law the rule is, that all the executors named in the will must be joined as plaintiffs. *Hensloe's case*, 9 *Coke* 37; *Hunt* v. *Kearney, Penn.* 721; *Executor of Hill* v. *Smalley*, 1 *Dutcher* 374.

The rule in equity is, that all the executors who prove the will must be parties—none others need be so. *Davies* v. *Williams*, 1 *Sim.* 5; *Kelby* v. *Stanton*, 2 *Younge & Jer.* 77; *Cramer* v. *Morton*, 2 *Molloy* 108; 2 *Will. on Ex'rs* 1626; *Thompson* v. *Graham*, 1 *Paige* 384; 1 *Daniell's Ch. Prac.* 273; *Marsh's Ex'rs* v. *Oliver's Ex'rs*, 1 *McCarter* 262.

In *Cramer* v. *Morton*, the Chancellor said, "I am clear than an executor armed with probate, without an executor named in the will, but not joined in the probate, is competent to sue. If he was not, this inconvenience would follow, he cannot compel the other either to prove, or to renounce, or to join as co-plaintiff. But if he will do none of these things, he must be made a defendant. But this is an inconvenience without benefit or good sense."

So at law one executor cannot sue another, but in equity he may. *Tothill* 74; *Wyatt's Prac. Reg.* 209; 2 *Will. on Ex'rs* 1625.

The reasons assigned for the rule at law are, that the executors constitute but one person; that each executor derives his interest from the will itself; that the probate is merely operative as the authenticated evidence, and not as the foundation of the executor's title; and that the renun-

ciation is a renunciation of probate merely, and not a renunciation or waiver of title. 1 Will. on Exrs. 259.

It has often been said that the reasons for the rule at law are not satisfactory. The rule itself leads to no valuable end. It is inconvenient in practice, and operates to embarrass and delay suitors. It is at best a technical rule, of which the common law courts rid themselves whenever it is necessary to the ends of justice. Thus, notwithstanding the rule, that one executor cannot sue another, it was held, in *Rawlinson* v. *Shaw*, 3 *T. R.* 557, that an executor who has renounced may sue the acting executor. So if the executor who has renounced refuses to join in an action, he may be proceeded against by summons and severance, after which the acting executor will be permitted to prosecute the suit alone. *Bodle* v. *Hulse*, 5 *Wend.* 313.

But why should this formality be resorted to after the executor has by a solemn instrument under his hand and seal renounced the executorship?

In the elaborate opinion in *Hensloe's case*, 9 *Coke* 38 *a*, which is the foundation of all the subsequent authorities, it is said, that "when the spiritual court have proved the testament their authority is executed, and they have not power to take the refusal of any, when any of the executors prove the will. And therefore the refusal of any of the executors before the Ordinary in such case is void." And again, to the objection that one who hath waived the executorship should not afterwards take the same upon him, it is answered, "forasmuch as the ecclesiastical judge hath not power to receive that refusal or disagreement, it is upon the matter done to a stranger, and by consequence void and of no force to bar the plaintiff to take upon him the same afterwards."

Whatever weight this argument may be entitled to under the English statute, it cannot, I think, be doubted that under our statute, and by the well settled practice of this state, the surrogate may receive the renunciation by an executor, and that it is not void. When a party named as executor has

thus renounced, why should it not be regarded as a final determination of his interest, or at least as conclusive upon the question until the ecclesiastical court has treated the renunciation as inoperative by granting probate to the party renouncing? A person appointed trustee will never be compelled to accept a trust against his will. *Hill on Trustees* 214, 225. A party named as executor cannot be compelled to accept the executorship, or bear the burthen of the trust, except by his own voluntary act. And it is difficult to conceive any good reason why he should be made a party to a suit touching a trust which he has formally renounced, and to which he disclaims all right or title, or why he should be brought into court merely for the purpose of being turned out again.

But aside from these considerations, which are adverted to merely in vindication of the course of practice in equity, it is enough to say that equity looks to the probate of the will as competent evidence of the power and authority of the executors to sue and be sued. It requires that the probate should be stated in the bill, and that those, and those only, who have proved the will should be parties to the suit. I speak, of course, only of the regular and ordinary practice of the court. An executor who has renounced may, by intermeddling with the estate or by other circumstances, be rendered a necessary party. Where such interest appears, he may be made a party at any stage in the progress of the suit.

The demurrer is overruled.

MICKLE CLEMENT and others *vs.* CHARLES KAIGHN and others.

On a bill to foreclose a mortgage, it appeared that C., one of defendants, recovered a judgment against K., the mortgagor, on the 23d of January, 1858, but took out no execution thereon until June 25th, 1862. Complainant's mortgage was recorded on the 26th of December, 1859, and in

June, 1861, several other judgments were entered against the mortgagor, on which executions were promptly taken out and levied on the mortgaged premises. On a dispute about the priority of these several encumbrances, it was held—

That C., by neglecting to issue an execution on his judgment until after executions had been issued on the junior judgments had lost his priority, not only over the younger judgments, but also over the complainants' mortgage, which was entitled to priority over the younger judgments.

The history of the legislation of this state regulating the priority of executions reviewed.

Although the statute *Nix. Dig.* 724, § 9, in terms, relates merely to the title which a purchaser by virtue of a sheriff's sale under an execution at law shall acquire, the operation of it cannot be limited only to the case of a sale under the junior judgment where no execution has been sued out upon the senior judgment, and levied on the land.

The junior judgment, by suing out and levying the first execution upon the land, acquires a priority of lien, which cannot be affected by any execution subsequently issued, nor by any sale in which the land may be sold. The issue of the execution upon the junior judgment, and its delivery, duly recorded, to the sheriff destroys the priority which was enjoyed by the older judgment, and transfers it to the junior judgment.

Executions against real estate have priority according to the time of their delivery, duly recorded, to the sheriff, irrespective of the dates of the judgments.

The same result which would follow from a sale on an execution issued on the junior judgments would follow a sale under a decree of this court. The order of the encumbrances cannot be changed or affected by the tribunal out of which the execution issues.

Where a statute, originally one, has its provisions broken up by a revision of the law, and incorporated in two different acts, the construction of these provisions cannot be affected by their change of collocation. They are *in pari materia*, and their construction must be the same as if they remained, as originally enacted, parts of the same statute.

The facts of this case sufficiently appear by the opinion of the Chancellor.

The case was argued *ex parte* by

Mr. P. L. Voorhees, for the mortgagee.

At common law, judgments were not liens upon lands, and would not have bound the premises—they are liens only by force of the statutes.

The question in this case arises by force of the statutes of this state entitled "an act respecting executions," &c., *Nix. Dig.* 247, and an act entitled "an act making lands liable to be sold for the payment of debts," *Nix. Dig.* 722.

The act entitled "an act to register mortgages" makes a mortgage void against a subsequent judgment creditor, or bona fide purchaser or mortgagee not having notice thereof, unless acknowledged according to law and duly recorded. *Nix. Dig.* 527, § 10, cannot in any way affect this question.

The statutes above referred to respecting executions and making lands liable to be sold for payment of debts, or such parts thereof as affect the question in this case, are taken from an earlier statute, passed in 1799, which was substantially the same as the first statute of this state making lands liable to be sold for payment of debts upon execution, passed in 1743, 17 Geo. 2. See 1 *Neville's Laws* 279; *Allison's Laws* 129.

By the 1st and 2d sections of this statute, lands are to be sold as chattels for the payment of debts, and by the subsequent sections, provisions are as to the manner of advertisements, sales, making deeds, &c.

By the 7th section of this act (which is substantially the same as the 9th section of the "act making lands liable to be sold for debts," *Nix. Dig.* 724,) it is provided that lands sold by execution shall be free and clear of all judgments and recognizances upon which no execution has been issued.

By the 11th section of the act of 1743 it is provided, that when sundry executions have issued, and sufficient cannot be levied to satisfy all, that such priority and preference as the law gives in the case of executions against personal estate only shall be given, and all disputes shall thereby be regulated and determined.

The preferences then given by law in cases of executions against personal property was, that the goods and chattels should only be bound from the actual delivery of the writ to the sheriff or officer. 3 *Bla. Com.* 420, 421.

To the act of 1743, a supplement was passed in 1779,

making provisions for the execution of deeds, &c., in case of a sale by a sheriff, and his death before the delivery of the deed, &c. *Wilson's Laws* 79.

The above acts remained in force until the revision by Judge Paterson, in 1799, when they were repealed, and an act entitled "an act making lands liable to be sold for the payment of debts" was passed. See *Paterson's Laws* 369.

By the 2d section of the last named act it is enacted, that no judgment should bind the land but from the time of the actual entry of such judgment in the minutes of the court.

By the 3d section it was enacted, that no writ of execution should bind property or goods but from the time such writ was delivered to the sheriff or officer, and for the manifestation of such time the sheriff should endorse on such writ the day of the month when he received the same, and that if two or more executions were delivered the same day, that which was first delivered should be first executed and satisfied.

By the 4th section it was enacted, that when sundry writs issued against goods and chattels, lands and tenements, &c., of the same person, and sufficient could not be found to satisfy all, then the like priority and preference should be given as is given in the preceding section in writs of execution against goods only, and all disputes respecting the same should be adjudged and determined accordingly.

The 3d and 4th sections seem to have been substituted by the revisor for section 11 of the act of 1743; section 3 seems only declaratory of what the common law was in reference to writs of execution against goods; and section 4 makes executions against land subject to the same rule as to priorities, and in effect continues the 11th section of the act of 1743.

Section 13 of this act (*Paterson's Laws* 371) is the same as the 7th section of the act of 1743, and renders land sold on execution free from all judgments, &c., on which no execution had been issued, &c.

The above act, as revised by Judge Paterson, was con-

tinued unaltered, so far as the sections affecting this question are concerned, until the revision of 1846, although there were some supplements added thereto. See *Rev. Laws* 1820, 430; *Supplements; Rev. Laws*, 1820, 670, 794. See, also, *Elmer's Digest* 486 *et seq.*

Under this statute it is fully established at law that executions against real estate have priority according to the time of their delivery to the sheriff duly recorded. *Elmer* v. *Burgin*, 1 *Penn.* 187; *Johnston* v. *Darrah*, 3 *Halst.* 282. See also *Chaffees* ads. *Voorhees*, 4 *Zab.* 507.

By the revision of 1846 the above act was divided, a part of the sections being included in the act entitled "an act respecting executions," &c. *Rev. Stat.* 1846, 976; *Nix. Dig.* 247, *viz.* section 5 of act of 1799 is section 1 of act of 1846, section 7 of act of 1799 is section 2 of act of 1846, and sections 3 and 4 of act of 1799, are sections 3 and 4 of act of 1846, and the remaining sections of the act of 1799 are included in the act entitled "an act making lands liable to be sold for the payment of debts." *Rev. Stat.* 1846, 660; *Nix. Dig.* 722.

These two statutes, as they now stand, ought to be construed together, and such construction given to them as will give effect to both acts as if they were still one act. They were approved the same day, and neither has priority as to date of enactment. The sections of the two acts, as they now stand, or at least all the sections that control this case, were originally included in one act.

The revisors of 1846 had power to collate and revise public acts, and to reduce into one act different acts and parts of acts. *Rev. Stat.* 1846, 39; *Laws* 1845, 202.

The revisors did not alter the sections of these two acts; they are substantially the same as they were first drafted by Judge Paterson. The revisors only placed them in two acts, instead of leaving them in one, as they were before the revision.

There being no alteration in the words of the statute, only

in the arrangement of the sections, we submit the law remains the same as before the revision.

The converse of this rule is decided in the case of *Murphy*, 3 *Zab.* 192, in reference to the revision of 1799 by Judge Paterson. I am not aware that any decision has been made in reference to the revision of 1846.

This being established, we submit that the judgment and execution of S. Coulter are subject to the judgments and executions of the other judgment creditors, as reported by the master.

That although the statute, *Nix. Dig.* 722, § 2, provides that judgments shall not bind lands but from the time of their actual entry in the minutes, yet this does not create a complete lien, but rather an inchoate one; it is a lien that is liable to be divested by any subsequent judgment upon which execution shall be first issued, recorded, and delivered to the sheriff or officer, in accordance with the 4th section of statute, *Nix. Dig.* 247.

That Coulter, having failed to issue an execution on his judgment until long after the executions issued upon the subsequent judgments were recorded and delivered to the sheriff, failed to complete or perfect his lien; hence his judgment and execution are postponed to and subject to the judgments and executions of the other judgment creditors.

That when a person, by his own *laches*, loses a right, courts will not help him regain that right.

That the judgment lien of Coulter was a mere legal right conferred by statute; that he failing to complete and perfect that lien, and having become subject to the liens or rights of others, this court will not reinstate him to the position he would have held if he had completed or perfected his lien by issuing execution. *Douglas* v. *Houston*, 6 *Ohio* 162.

The judgment and execution of Coulter, thus being subject to the judgments and executions of other judgment creditors, must be subject to the mortgage of the complainant, which is prior to all the other judgment creditors; that when one, holding a lien by his own act, makes it subject to another

independent lien, it must be subject to all intervening liens; in other words Coulter, having permitted his judgment to become subject to the other judgments and executions, cannot thereby give them a priority over the mortgage of the complainant because he had an inchoate lien prior in time to the mortgage of the complainant.

As against subsequent encumbrancers, &c., this court will give effect to the judgment and execution of Coulter only so far as the same could be enforced by execution at law. *Buchan* v. *Sumner*, 2 *Barb. Ch. R.* 194, 195; *Mower* v. *Kip*, 6 *Paige's Ch. R.* 88; 2 *White & T. Lead. Ca. Eq.* 108.

As we have shown, the judgment and execution of Coulter are subject to the judgments and executions of the other creditors; that the judgments and executions of the other creditors are subject to the mortgage of the complainant. Therefore the judgment and execution of Coulter are subject to the mortgage of the complainant, and directions should be made to establish the priorities in accordance therewith.

That this is the true result will further appear from the 9th section of the act for the sale of lands, *Nix. Dig.* 724. By the provisions of this section, if at any time after the judgments were obtained, and executions delivered to the sheriff in January, 1861, the judgment creditors had proceeded and sold the mortgaged premises upon their executions, they would have conveyed the land free from the judgment of Coulter but subject to the mortgage. See *Den* v. *Young*, 7 *Halst.* 300.

The Chancellor. By the interlocutory decree in this cause, it was referred to one of the masters of the court to ascertain and report the amount due to the complainant, and also the amount due, if anything, to sundry creditors upon judgments specified in the bill of complaint, and also to ascertain and report the order and priority of the said mortgage and judgments.

The master reports that Stephen Coulter, one of the defendants, recovered judgment against Charles Kaighn, the

mortgagor, in the Supreme Court, on the twenty-third of January, 1858, upon which judgment there appeared to be due, at the date of the report, $12,103.93, but that no execution issued upon this judgment until June twenty-fifth, 1862, since the filing of the complainant's bill of complaint; that the complainant's mortgage, duly executed and acknowledged, was recorded on the twenty-sixth of December, 1859; that from January ninth, to June sixteenth, 1861, there were nineteen judgments recovered against the mortgagor, upon seventeen of which writs of *fieri facias* were issued to the sheriff of the county of Camden, where the premises lie.

Upon this state of facts, the master reports that he is unable to determine the order which the judgment of Coulter should occupy in the distribution of the proceeds of the sale of the mortgaged premises, whether it should be paid prior to the complainant's mortgage, thus having priority over the judgments to which it is subject, or whether it should be paid after the said judgments, thus losing its priority over the complainant's mortgage.

The entry of Coulter's judgment, being prior in point of time to the complainant's mortgage, is made by the statute a prior encumbrance. The judgment binds the land from the entry of the judgment on the records of the court. *Nix. Dig.* 761, § 2.

But the record of the complainant's mortgage, being prior to the entry of the defendant's judgments, is a prior encumbrance to those judgments. *Nix. Dig.* 550, § 10.

The order of priority of the several encumbrances, had no executions been issued upon the subsequent judgments, is perfectly clear. The embarrassment is created by the fact that executions were issued upon the junior judgments, and levied upon the land before any execution was issued upon the first judgment; and by the provision of the statute, which under such circumstances postpones the prior to the junior judgment, or in terms enables the junior judgment to sell the land clear of the encumbrance of the prior judgment.

Real estate in New Jersey was made subject to the pay-

ment of debts, and the proceedings of the sheriff thereon, regulated by the provincial act of December second, 1743. 1 *Neville* 279; *Allison* 129. By the first section of that act, it is declared that real estate within the province, belonging to any person indebted, shall be liable to and chargeable with all his just debts, and shall be chattels for the satisfaction thereof, in like manner as personal estates are seized, sold, or disposed of for the satisfaction of debts. By the third section, it is enacted that the sheriff shall make to the purchaser as good and sufficient a conveyance for the land purchased under the provisions of the act as the owner of the land could have made at the time of the judgment, and that the purchaser, by the said deed, shall be vested with as good and perfect an estate as the owner was seized of or entitled unto at or before the said judgment, and as fully as if the lands were sold and conveyed by the owner to the purchaser.

The sixth section declares that the purchaser shall hold the premises so purchased free and clear of all other judgments, by virtue whereof no execution has been executed upon the real estate so purchased. The seventh section directs that no process against real estate shall issue until the record of the judgment and the process shall have been inspected by one of the justices of the Supreme Court, and it shall have been certified by him that no error is therein apparent to him, and the said judgment and process shall be recorded in a book to be kept for that purpose before sending such process to the sheriff or other officer.

The tenth section directs that, where sundry executions have issued requiring the sale of real estate, such priority and preference shall be given as the law gives in the case of executions against personal estate only.

Then, as now, executions bound personal estate from the time of the delivery thereof to the sheriff. 2 *Bla. Com.* 421; *Nix. Dig.* 248, § 3.

These provisions of the act of 1743 have substantially continued in force till the present time. They will be found

embodied in the act of February 18th, 1799, § 1, 3, 4, 8, 12 13; *Paterson* 369; *Rev. Laws* 430.

The second section of the act of 1799 provides that th judgment shall bind the lands only from the time of the ac tual entry of such judgment on the minutes or records o the court; whereas, by the common law, it operated from th first day of the term in which it was entered, and by th statute of frauds, 29 *Charles* 2. *ch.* 3, from the day of sign ing the same. 3 *Bla. Com.* 420.

In the revision of 1846, the act of 1799 was broken up and its provisions incorporated in two different acts. Th first, eighth, twelfth, and thirteenth sections are retained a the first, third, eighth, and ninth sections of the "act makin lands liable to be sold for the payment of debts." *Nix. Dig.* 722. The third and fourth sections of the act of 1799 com pose the third and fourth sections of the act respecting exe cutions. *Nix. Dig.* 248.

The construction of these provisions cannot be affected b their change of collocation. They are in *pari materia*, an form parts of one entire system. Their construction mus be the same as if they remained, as originally enacted, part of the same statute. The acts of 1846 are cotemporaneous both being approved upon the same day. If the fact ha been otherwise, no inference could properly be drawn fro the circumstance that one statute was prior in time to th other. Both were mere re-enactments of long subsistin laws, whose construction was well settled and whose opera tion was regarded as beneficial.

Reverting, then, to the plain provisions of the statute they declare that the judgment shall bind the lands from th time of the actual entry of the judgment on the records o the court. *Nix. Dig.* 722, § 2. It constitutes a valid en cumbrance as against all subsequent alienations, mortgage and judgments.

And if the land be sold and conveyed by virtue of an exe cution upon the judgment, the deed will vest in the pur chaser the same estate in the premises as the defendant i

execution was entitled to at the entry of the judgment. *Nix. Dig.* 723, § 8.

But if the plaintiff in the first judgment neglect to sue out execution, he loses the priority to which he is otherwise entitled over subsequent judgments upon which executions are sued out. The provisions of the statute, so far as they are material to the present inquiry, are as follows: "Whereas other judgments, by virtue of which the sale under execution is made, might affect the real estate so sold, if no provision be made to remedy the same; and whereas persons who have not taken, or will not take out executions upon their judgments, ought not to hinder or prevent such as do take out executions from having the proper effect and fruits thereof, therefore be it enacted, that the purchaser shall hold the real estate by him purchased as aforesaid free and clear of all other judgments whatsoever on or by virtue of which no execution has been taken out and executed on the real estate so purchased." *Nix. Dig.* 724, § 9.

The statute, in terms, relates merely to the title which a purchaser by virtue of a sheriff's sale under an execution at law shall acquire. It declares that the purchaser under *a sale* by virtue of an execution issued upon a junior judgment shall hold the land clear of all judgments upon which no execution has been taken out and executed on said land. In effect that gives to the junior judgment, by virtue of which the *land is sold*, priority over the senior judgment upon which no execution hath been sued out and executed upon the land. But the design of the statute is to give to the plaintiff in the junior judgment upon which execution is first sued out "the proper effect and fruits thereof." The operation of the statute cannot, therefore, be limited to the case of a sale under the junior judgment, where no execution hath been sued out upon the senior judgment and levied upon the land. For if that were so, it would enable the plaintiff in the prior judgment to sue out and levy his execution upon such judgment after the levy under the execution upon the junior judgment, and thus defeat the express

object of the statute by preventing the plaintiff in the junior execution "from obtaining the effect and fruit thereof." To give effect, therefore, to the statute, it is necessary to hold that the plaintiff in the junior judgment, by suing out and levying the first execution upon the land, acquires a priority of lien, which cannot be affected by any execution subsequently issued, nor by any mode in which the land may be sold. The issue of the execution upon the junior judgment, and its delivery, duly recorded, to the sheriff, destroys the priority which was enjoyed by the older judgment, and transfers it to the junior judgment. It reverses the priority of the encumbrances, no matter in what mode the land may be sold. This, I think, must have been the result if there were no further provision upon the subject. But the statute further declares, that where sundry executions issue against the goods and lands of the same person, then the like priority and preference shall be given as is given in writs of execution against goods only, *viz.* they shall bind the property from the time that the writ, duly recorded, shall be delivered to the sheriff. *Nix. Dig.* 248, § 3, 4; 722, § 3.

It is well settled, in the construction of these provisions, that executions against real estate have priority according to the time of their delivery, duly recorded, to the sheriff, irrespective of the dates of the judgments. *Elmer* v. *Bursen*, *Penn.* 187; *Johnston* v. *Darrah*, 6 *Halst.* 282; *Voorhees* v. *Chaffees*, 4 *Zab.* 507.

The same order of priority must obtain where the sale of the land is made by virtue of a decree in equity. The proceeds of the sale must be distributed according to the order of the *legal* priority of the encumbrances.

The encumbrance of Coulter's judgment upon the mortgaged premises, by reason of his failure to sue out execution, must be postponed to the encumbrance of the junior judgments upon which executions have been sued out and executed. As an inevitable consequence, it must be postponed, also, to the encumbrance of the complainant's mortgage, which is prior to the junior judgments, and whose priority

cannot be affected by any *laches* of the plaintiff in the prior judgment. The plaintiff in the prior judgment can prevent that consequence only by satisfying the subsequent judgments.

If the land be sold by virtue of an execution issued upon the junior judgment, the purchaser would take title clear of the prior judgments, but subject to the mortgage. In effect, the prior judgment would be postponed not only to the subsequent judgments, but also to the mortgage. This is the inseparable consequence of the *laches* of the plaintiff in not suing out execution upon his judgment. The same result will follow from a sale under a decree of this court. It never could have been contemplated that the order of the encumbrances should be changed or affected by the tribunal out of which the execution issued. This would put it in the power of the mortgagee or of the prior judgment creditor, by purchasing the mortgage, to defeat the purpose of the statute, and the rights of the junior judgment creditor acquired under it.

The order of priority of the respective encumbrances will be decreed accordingly.

CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

OCTOBER TERM, 1862.

JOHN L. SMALLWOOD and others *vs.* ROBERT LEWIN and othe

A married woman purchased a farm, which was encumbered by a m gage, which, although registered, contained an important proviso signed to secure prompt payment of the interest, which proviso was disclosed by the registry of the mortgage. The purchaser took premises subject to the mortgage, and assumed the payment of it a part of the consideration of her purchase. On a bill filed to forec the mortgage, in which the purchaser set up that she was a *bona* purchaser without notice of the proviso, because it was not disclosed the registry, it was *held*—

That it was totally immaterial whether the mortgage was registered or the purchaser had *actual notice* of the existence of the mortgage.

That the covenant by a married woman does not impose any obligat upon her personally is immaterial; the complainant is not seeking enforce the obligation as against her personally, but to have the l applied to the satisfaction of the debt for which it was given.

The general doctrine is, that whatever puts a party upon an inquiry amou in judgment of law to notice, provided the inquiry becomes a duty, a the case of purchasers and creditors, and would lead to the knowledg the requisite fact by the exercise of ordinary diligence and understa ing. So notice of a deed is notice of its contents, and notice to an a is notice to his principal.

The answer of defendants denying notice will avail nothing against

clear and well settled principle, charging them with notice of the contents of of the mortgage.

The object of the laws requiring conveyances to be recorded, is to prevent imposition on subsequent purchasers and mortgagees in good faith *without notice* of the prior conveyance, but not to protect them when they have such notice. It is no part of their office to furnish information of the contents of deeds and mortgages of which the subsequent purchaser has actual notice. A defective registry cannot qualify the effect of actual notice.

Blake and *Williamson*, for complainants.

Keasbey, for defendants.

THE CHANCELLOR. The bill is filed to foreclose a mortgage, given by Robert Lewin to Silas B. Condict, bearing date on the first day of May, 1857, to secure the payment of a bond, of even date, conditioned for the payment of $15,000, on the first of May, 1864, with interest at seven per cent. per annum, payable semi-annually on the first days of June and December, until the payment of the principal. The bond also contains an agreement, that should any default be made in the payment of the interest, or of any part thereof, on any day whereon the same is made payable, and should the same remain unpaid and in arrear for the space of thirty days, then the principal, with all arrears of interest thereon, shall, at the option of the obligee or his representatives, become due and payable immediately thereafter. An abstract of the mortgage was recorded on the twentieth of May, 1857, stating truly the amount of the mortgage and the time of payment of principal and interest, but omitting the special agreement by which it was stipulated, that upon failure to pay any instalment of interest for thirty days the principal should become due and payable. Subsequent to this registry, on the first of August, 1857, the premises were conveyed by the mortgagor to Sarah F. Johnson, subject to the complainant's mortgage, which mortgage, with interest, the grantee assumed to pay and discharge as a part of the consideration of the conveyance. Johnson and his wife,

the grantees in the deed, by their answer, deny that they, or either of them, had any notice whatever, actual or constructive, of the special agreement contained in said mortgage; and they insist that, as the statute requires that the abstract recorded shall contain the time when the mortgage is payable, the defendants were entitled to rely upon the abstract for full information as to the time of payment and all conditions annexed thereto; and that, as to the special agreement, Sarah F. Johnson is a *bona fide* purchaser without notice, and cannot be affected thereby. They admit the covenant by the grantee to pay the mortgage debt with interest, but deny that the covenant imposed any obligation upon the grantee, she being a *feme covert.*

The defence is not that the registry is unauthorized or illegal, but that it is defective in not stating fully the condition of the mortgage. It is not claimed that the mortgage has lost its priority by virtue of the defect in the registry, but that it can operate only as constructive notice of what is contained in it; that it stands upon the same footing with a defective statement by the registry of the amount of the *debt* or of the *premises* mortgaged, which will defeat *pro tanto* the claim of the mortgagee to priority.

It is unnecessary, for the purposes of this cause, to decide whether this registry is or is not defective, and whether the defendant is, by virtue of the registry act, charged with constructive notice of the terms of the mortgage. It is totally immaterial whether the mortgage was registered or not. The grantee, at the time of the conveyance, had actual notice of its existence. The mortgage debt constitutes part of the consideration of the conveyance, and by the express terms of the deed, the grantee engages to pay it. That her covenant to pay the debt imposes no obligation upon her *personally* is immaterial. The complainants are not seeking to enforce the obligation as against her personally, but to have the land applied to the satisfaction of the debt for which it was mortgaged. The only question is, had the grantee actual notice of the mortgage?

The general doctrine is, that whatever puts a party upon an inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. So notice of a deed is notice of its contents, and notice to an agent is notice to his principal. 4 *Kent's Com.* 179.

The answer of the defendants denying notice will avail nothing against this clear and well settled principle, charging them with notice of the contents of the mortgage.

But it is urged, that although the defendants had actual notice of the existence of the complainant's mortgage, yet that they were misled by the contents of the registry, upon which they had a right to rely.

The evidence of Johnson shows clearly that neither he nor his wife was in point of fact misled by the registry. It is not pretended that the registry was consulted before the purchase was made. He says that the first time he saw the registry was when he took the deed to his wife to the office to be recorded. In making the purchase, she must have relied upon information derived from the vendor. If the purchaser took title relying upon erroneous information derived from the vendor, or without inquiry as to the terms of the mortgage, she must bear the consequences of her own indiscretion. The registry, it is clear, did not contribute in any wise to mislead her.

Nor do I think the case would have been at all altered, if in point of fact the registry had been consulted by the purchaser before the deed was delivered. The object of the laws requiring conveyances to be recorded is to prevent imposition on subsequent purchasers and mortgagees in good faith *without* notice of the prior conveyance, but not to protect them when they have such *notice*. It is no part of their office to furnish information of the contents of deeds and mortgages of which the subsequent purchaser has actual notice. The complainants rely in support of their claim to priority, not upon the constructive notice furnished by the

registry, but upon actual notice to the purchaser of the existence of their mortgage. If there was no registry, the complainants' title to priority, and right to enforce their encumbrance against the property of the defendants would be clear. A defective registry cannot qualify the effect of actual notice.

There is nothing in the case made by the defendants that can affect the complainants' priority, or in anywise impair their legal rights.

The want of actual knowledge, on the part of the defendants, of the terms of the special agreement, had it existed when the forfeiture was incurred by a failure to pay the instalment of interest, might have afforded sufficient grounds in equity for relieving the defendants from the penalty thereby incurred. But it is shown that several instalments of interest have fallen due since Mrs. Johnson acquired title, and that the defendants, with full knowledge of the special agreement in the complainants' mortgage, have neglected and refused for more than thirty days to make payment of the interest so due. They have no claim to equitable relief.

The complainants are entitled to a decree.

THE NEWARK LIME AND CEMENT MANUFACTURING COMPANY *vs.* THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK.

When an act of the legislature authorized commissioners, thereby appointed, to select a site for a bridge over the Passaic river, within certain limits in the city of Newark, and to erect, or cause to be erected, a bridge over the said river, and to lay out a road four rods wide from the court-house in Newark to the place where the bridge was to be built, and the commissioners, having located the bridge, and provided for its erection proceeded to lay out the road, and by the survey and return of which recorded as required by the act, it appeared that the highway was laid out to "the west end of the bridge"—

Held, that inasmuch as the survey carries the highway to the river, wherever the river is found, there the highway extends. If the shore is ex

tended into the water by alluvial deposits, or is filled in by the proprietor of the soil, the public easement is, by operation of law, extended from its former terminus over the new made land to the water.

The owner of the soil, even when his title is unquestioned, cannot, by filling in, and thus extending his land towards the water, obstruct the public right of way to the river.

The highway being required to be sixty-six feet wide, and the bridge being only required to be thirty-two feet wide, if in progress of time it had been found the interest of the bridge proprietors to widen the bridge to sixty-six feet, it is not perceived why they may not lawfully have done so, and required the full width of the highway for that purpose. The public could not justly have contracted the highway to the prejudice of the proprietors, nor, on the other hand, can the proprietors, by leaving a part of the highway unappropriated, impair the rights of the public, much less can they despoil the public of their rights by claiming title hostile to those under whom they claim.

The proprietors of the bridge may be deemed to have the right to the enjoyment, for the purposes of the trust committed to them, of the whole terminus of the highway upon the river. This seems necessarily involved in the right of constructing a bridge for the accommodation of the highway across the river to any width they may deem proper over thirty-two feet; but this possession was not independent of or hostile to the public right, and no right adverse to the public could be acquired under it.

If, under such circumstances, the bridge proprietors, or those claiming under them, set up title adverse to the public easement, and especially if they invoke the aid of a court of equity to protect them in the enjoyment of such pretended right, it becomes them to show conclusively the existence of the right, and how they acquired it.

J. P. Bradley, for complainants.

T. Runyon, for defendants.

THE CHANCELLOR. By a resolution of the common council of the city of Newark, approved on the fourth of October, 1858, the street commissioner was directed to notify the owner of any building, fence, or other encroachment or obstruction, on Bridge street below Ogden street, to remove the same; and in case the owner neglected or refused to remove the same within thirty days from the time of receiving such notice, the street commissioner was directed to cause the same to be removed, as provided by an ordinance of the

city relating to streets and highways. In obedience to this order, the street commissioner served a notice upon the complainants to remove a certain building, fence, and encroachment, in front of their property, on the south side of Bridge street. With this notice the complainants refused to comply, and thereupon the street commissioner threatened to take down and remove the building, and open Bridge street over a strip of land and wharf claimed by the complainants as their property. To restrain this action by the street commissioner the bill in this cause was filed, and an injunction was issued pursuant to the prayer of the bill.

The case made by the bill is briefly this:

By an act of the legislature, passed on the twenty-fourth of November, 1790, entitled "an act for building bridges over the rivers Passaic and Hackensack, and for other purposes therein mentioned," commissioners were appointed with powers, among other things, to select a site for a bridge over the Passaic river, within certain limits designated in the act, and to erect, or cause to be erected, a bridge over the said river. They were also empowered to lay out a road four rods wide from the court-house, in the then town of Newark, to the place where the bridge was to be built over the Passaic river, thence to the place where the bridge was to be built over the Hackensack river, and thence to Powleshook. The act required a return of the road, thus laid out by the commissioners, to be made and recorded. The commissioners, having located the bridge over the Passaic at the place in the city of Newark now known as the foot of Bridge street, and having also located the bridge over the Hackensack, in pursuance of powers conferred on them by the act, on the nineteenth day of February, 1793, by an indenture of that date, leased the bridges, so to be erected and built, to certain individuals, and contracted with said lessees for the building and keeping in repair of said bridges for the term of ninety-seven years. The lessees, prior to the year 1794, proceeded to erect the bridge over the Passaic river, at the place designated, thirty-two feet in width, and also the

bridge over the Hackensack, and the said lessees and their successors have ever since kept and maintained the said bridges. After the erection of the bridge over the Passaic river, the commissioners proceeded to lay out the road authorized by the act, and filed a survey, and return thereof, on the fifteenth of January, 1794, which was duly recorded. By a supplemental act, passed on the tenth of November, 1795, the commissioners were authorized, in consequence of a mistake in the return of the said road, to correct and alter the same, so as to take in and comprehend the road originally intended by them to be laid out, and to have the returns thus altered recorded. In pursuance of the power thus conferred, the commissioners rectified the mistake, and laid out anew the said road, by a return bearing date on the first of July, 1796. The road, as laid by the commissioners, extended, northwardly along Broad street, in the city of Newark, to the place where Bridge street now is, and thence eastwardly to the first pier of the bridge over the Passaic river, forming the street now called Bridge street. At the time the road was surveyed and located, the first pier of the bridge was about eighty feet westerly of the present westerly abutment of the bridge; the west side of the river at that point having been docked out and filled in, and the complainants, in consequence thereof, having filled in the space originally covered by the west end of the bridge from the original west pier to the present west abutment, and have, since such filling in, kept the said space in repair as a causeway of approach to the said bridge and as part thereof.

The bill further alleges that, soon after the first building of the bridge over the river Passaic, the proprietors thereof procured title to a strip of land along the south side of the bridge at its western terminus, and extending eastwardly to low water mark in the Passaic river; that about the year 1800, they erected a house there for the accommodation of their keeper, and that, by a deed, dated on the tenth of August, 1842, the proprietors of the bridges conveyed the said strip of land, with the building thereon, to the complainants, and the com-

plainants have since had the seizin and possession thereof. At the time of the purchase by the complainants, the west abutment of the bridge was twenty-five feet easterly of the east end of the building, and the proprietors of the bridge, two or three years before the filing of the complainants' bill, removed the abutment twenty feet further east, to its present location. Complainants have filled in and docked out the strip conveyed to them, and have built a wall to prevent the causeway, which is ten feet higher than the lot, from caving in and falling upon the lot. The lot is now eighty feet in length, fourteen feet wide at the west end, and ten feet at the east end, and that the wharf is an important part of complainants' wharf.

It is not denied that Bridge street, like all the other streets in Newark, is under the control of the city council, and that, in directing obstructions and encroachments upon the street to be removed, they were acting within the legitimate scope of their powers. The only question is, whether the land where the building is erected, and to which the complainants claim title, is or is not a part of Bridge street. The city claims that the street extends to the bridge, as now constructed, its full width of four rods, or sixty-six feet. Within those limits the complainants' building and the land to which they claim title is situate. The complainants contend that the street extends only to the point where the westerly abutment of the bridge formerly stood, and that the space between that point and the present westerly abutment of the bridge is a causeway of approach having a lawful width of only thirty-two feet, the original width of the bridge itself. It appears, by the defendants' answer, that the highway, as laid out and returned by the commissioners, did not stop at the pier of the bridge, but was extended across the river. The description in the survey, after arriving at a point in Broad street, is as follows: "thence north, seventy-nine degrees and fifty minutes east, twelve chains and eighty-six links, to the first pier of the said bridge building over Passaic river; thence across and over the said river north, eighty-

four degrees and fifteen minutes east, seven chains." The description in the amended return is as follows: "thence north, eighty degrees east, twelve chains and seventy-seven links, to the west end of the bridge; thence south, eighty-four degrees east, eight chains and fifty-three links, to the east end of said bridge." The description in both returns is substantially the same, varying slightly in course and distance. The monument called for at the end of the first course is not the abutment of the bridge nor the causeway leading to the bridge, but in the one return it is the pier, or face of the abutment upon the river, which supports the bridge; in the amended return the call is for the bridge itself, and thence the highway extends across the river to the east end of the bridge.

It is objected that a highway cannot be laid across a navigable river. It may be admitted that there is no subsisting highway for horses or carriages in the channel of the river. But it is enough, for all the purposes of this cause, that the survey carries the highway to the river, and wherever the river is found there the highway extends. If the shore is extended into the water by alluvial deposits, or is filled in by the proprietor of the soil, the public easement is, by operation of law, extended from its former terminus over the new made land to the water. The owner of the soil, in whom the unquestioned title is, cannot, by filling in, and thus extending his land toward the water, obstruct the public right of way to the river. *The People* v. *Lambier*, 5 *Denio* 9.

The principle was recognized and adopted by the Court of Appeals of this state in the case of *The Morris Canal* v. *The Inhabitants of Jersey City*, 1 *Beasley* 547.

This would be the result if the unquestioned title to the soil was in the complainants. But it is quite clear, from the evidence, that the complainants have no title whatever to the freehold. They claim title under a deed from the bridge proprietors, dated on the tenth of August, 1842, but not acknowledged until the nineteenth of November, 1844, about fourteen years before the filing of their bill. The bill

alleges, that soon after the first building of the bridge, the bridge proprietors, under whom the complainants claim, acquired title to the land in question; but how, when, or from whom the title was acquired, or what the title was, they do not state. The allegation of the bill is, that soon after the first building of the bridge over the Passaic river, the proprietors thereof procured the title to a small strip of land along the south side of the bridge at its westerly terminus about fourteen feet in width, and extending in length from the westerly terminus of the said bridge, along the south side thereof easterly, to low water mark in the Passaic river, upon which strip of land the said proprietors afterward, in or about the year 1800, erected a house for the accommodation of their gate-keeper, which house is still standing. It is clearly shown, by the evidence, that the house was erected, as the bill alleges, by the bridge proprietor for their gate-keeper; that it stands now in its original location; that its west end stood on the same bulkhead with the west pier of the bridge, and that the house extended eastward over the waters of the river, and that the tide flowed under it. Not only does the bill fail to state the origin of the complainants' title, but there is no evidence whatever other than mere occupancy, in support of the claim of title. The evidence is all adverse to the claim. It is shown that the tide flowed under the house years after it was erected that vessels drawing four to six feet of water lay at the bulkhead immediately above and below the bridge. How did the bridge proprietors acquire title to the soil of a navigable river below high water mark? It was clearly in the public when the house was erected. How was the public right divested? The riparian proprietor might have acquired title by filling in and reclaiming land from the river. But no title to the shore is shown or pretended to have been in the bridge proprietors. On the contrary, the complainants' own evidence shows that, when the highway now called Bridge street was laid out, James Davis owned the land over which it was laid from Broad street to the river and

a each side of the present bridge. They deduce no title from Davis or his heirs. The officers and stockholders of the bridge company have been examined. They state that they supposed they had title, but not one of them intimates that they ever acquired a title by grant, purchase, or conveyance to a foot of the shore, or that they ever paid one dollar consideration for it. The whole evidence renders it clear that they never had such title.

It is equally clear that the proprietors acquired no title to their land, either from the lease made to them, by the commissioners, on the nineteenth of February, 1793, or from their act of incorporation, of the seventh of March, 1797. The effect of the contract was simply a grant, by the state to the proprietors, of the right of constructing the bridges, and the franchise of taking tolls thereon for the term of ninety-seven years, and a covenant, on the part of the proprietors, to construct and keep in repair the bridges during the term, and at the expiration thereof to surrender the property into the hands of the state. *Bridge Proprietors* v. *The State*, 1 *Zab.* 384.

All that the bridge proprietors can rightfully claim under the contract, as against the public, would be the right to the unobstructed use of so much of the public highway as may be necessary for the full and unlimited enjoyment of their franchise. They were required, by the terms of their contract with the commissioners, to build the bridge not less than thirty-two feet in width; and it may be that, in contracting the span of their bridge, and lengthening the causeway to it, they are not bound to build their causeway more than the required width of the bridge, to wit, thirty-two feet, and that they were justified in encroaching upon the highway by the erection of their toll-house without the limits of the thirty-two feet. But they clearly acquire no right by which they can defeat the public easement.

The proprietors were invested with an important public trust, the continuance of a public highway across the river by means of a bridge, which they agreed to erect and

maintain, and upon which they were vested with the franchise of taking tolls. The highway to the bridge was sixty-six feet wide. It was so required to be under the act by virtue of which the bridge was erected, and under which the proprietors acquired their rights. They were required to build the bridge only thirty-two feet. If in the progress of time, it had been found the interest of the proprietors to widen the bridge to sixty-six feet, the full width of the highway, it is not perceived why they might not lawfully have done so, and required the full width of the highway for that purpose. The public could not justly have contracted the highway to the prejudice of the proprietors; nor, on the other hand, can the proprietors, by leaving a part of the highway unappropriated, impair the rights of the public, much less can they despoil the public of their rights by claiming title hostile to those under whom they claim. The proprietors may be deemed, by virtue of their lease, to have gone into possession, and to have the right to the enjoyment, for the purpose of the trust committed to them, of the whole terminus of the highway upon the river. They had a right to occupy and use the whole of it for the purposes of their incorporation. This possession seems necessarily involved in their right of constructing a bridge, for the accommodation of the highway across the river, to any width they may deem proper over thirty-two feet. But this possession was not independent of or hostile to the public right, and no right adverse to the public could be acquired under it. If under such circumstances the bridge proprietors, or those claiming under them, set up title adverse to the public easement, and especially if they call upon the aid of a court of equity to protect them in the enjoyment of such pretended right, it becomes them to show conclusively the existence of the right, and how they acquired it.

The fact, that the bridge proprietors have contracted the water span of their bridge by supplying what was originally the west end of the bridge within the limits of the city of Newark with a solid embankment of earth, may give rise to

questions between the city and the proprietors touching the obligation to repair, or the control of the city over the causeway thus formed; but these questions, should they arise, are proper for the consideration of a court of law, and are in no way involved in the present controversy.

I am clear that the complainants are not entitled to relief, and that their bill must be dismissed.

MALLORY'S ADMINISTRATOR *vs.* BALFOUR CRAIGE and the ADMINISTRATOR OF BALFOUR CRAIGE, deceased.

B. C., being indebted to the complainant, died without personal estate, but seized of a lot of land in the city of Newark, which, by his will, he devised to his infant son. After his death, the lot was taken by the city of Newark for a street, and its value was paid into the hands of the city treasurer, according to a provision of the city charter.

On a bill filed by the complainant to obtain satisfaction of his debt out of the money in the hands of the treasurer, it was *held*, that the proceeds of the land in the hands of the treasurer are assets for the payment of the debts of the deceased, and must be applied accordingly. The treasurer was decreed to pay the funds into the hands of the administrator of B. C., deceased.

Although it seems doubtful whether it would not be the better practice to send the parties to the Orphans Court for a final settlement, yet the general practice appears to be otherwise. Ordinarily, when the parties are before the court, the final account is settled in Chancery.

T. Runyon, for complainant.

THE CHANCELLOR. The debt due to the complainant's intestate from the estate of Balfour Craige, deceased, is satisfactorily established by the evidence. Craige died leaving no personal estate for the payment of his debts, but seized of a lot in the city of Newark. After his death, the lot was taken by the city of Newark for a public street, and the appraised value of the land, under a provision of the city charter, paid into the hands of the treasurer of the city,

where it still remains. The land was devised by Craige t his infant son, in whom the title was vested at the time th land was taken and appropriated to public use by the city The devisee took the title charged with the debts of the tes tator. The proceeds of the sale, in the hands of the treasure are assets for the payment of his debts, and must be applie accordingly. The treasurer will be decreed to pay the fund into the hands of the administrator of Balfour Craige, de ceased.

The bill prays that the assets may be applied, under th direction of this court, to the payment of the debts of th complainant and such other of the creditors of said Balfou Craige, deceased, as may apply to the court for the purpos of having their debts against the estate allowed. My doub has been whether it would not be the better practice to sen the parties to the Orphans Court for a final settlement. Bu though this may be, and sometimes is done, the genera practice appears to be otherwise. Ordinarily, where th parties are before the court, the final account is settled i Chancery. *Thomson* v. *Brown*, 4 *Johns. C. R.* 630, 643 1 *Story's Eq. Jur.*, § 543 *a*, § 546 *and note* 2; *Ram. o Assets, chap.* 24, § 2.

In this case the fund is very small, and it does not appea that there are any other creditors except the complainan The testator has been dead many years, and no attemp seems to have been hitherto made to have this fund applie to the satisfaction of the debts. The ends of justice w probably be better and more speedily attained by having th final account taken in this court.

There must be a reference to a master to state the ac count of the debts and credits of the estate, giving such rea sonable notice as he may deem proper for the creditors t come in and prove their debts.

JOHN S. HOWELL and others *vs.* SARAH M. HOWELL and others.

It is a well established doctrine of equity, that where, upon the purchase of real estate, the title is taken in the name of one person, and the purchase money is advanced by another, the parties being strangers to each other, there is a resulting trust in favor of the party from whom the consideration proceeds.

When the purchase is made, and the money advanced by a father, and the title taken in the name of a son, the purchase would be deemed an advancement; but when the purchase is made, and the money advanced by the son, and the title taken in the name of the father, the relation of the parties will not defeat the resulting trust.

In this case the farm was purchased by two sons, for their own use: they paid all the purchase money that they could raise, and in order to enable them to pay the balance, their father mortgaged his own farm, and to secure himself for such advance, took the title for the farm in his own name. During the lifetime of the father, the sons treated the mortgage debt as their own, paid the interest on it, and also used and enjoyed the farm purchased as their own, the father disclaiming all interest in or control over it. The father afterwards died intestate as to the farm so purchased, but by a will, made before the purchase, he devised his own farm to the two sons, charged with the payment of all his debts. On a bill, filed by the two sons against the other heirs of their father, praying that the farm be declared to be held by the heirs of the father in trust for the two sons, it was *held* that the other heirs of the father would be declared trustees for the complainants, and they were decreed to convey their respective interests to them.

Although ordinarily the trust must arise at the time of the making of the deed, and if part only of the consideration be paid at the time by the party claiming the benefit of the trust, the trust results in his favor only to that amount, although he subsequently pays the whole purchase money; yet in this case the whole purchase money must be regarded as paid by the complainants, and the transaction between the sons and the father must be regarded as a loan by the father to the sons to enable them to make the purchase.

The facts of this case are fully stated by the Chancellor in his opinion.

The cause was argued *ex parte* by

T. N. McCarter, for complainants.

THE CHANCELLOR. The complainants, by their bill, se relief against the operation of a deed of bargain and sa bearing date on the twentieth of March, 1858, made to th father, Lewis Howell, by Dennis Cochran, for a farm in t township of Newton. The bill charges that the farm w purchased by the complainants for their own use, and th so much of the consideration as has been paid was paid them; that being unable to raise the balance of the purcha money by mortgage upon the premises, in consequence of pre-existing encumbrance, their father consented to aid the by raising money by mortgage upon his own farm. T money was so raised, and by way of security therefor, t deed for the premises purchased of Cochran was made rectly from him to the father of the complainants, but reality for the use of the complainants themselves. Sir the conveyance the father has died leaving a will, execut some years prior to the date of the conveyance, devising the complainants the farm so mortgaged by him charg with the payment of his debts. As to the farm conveyed Cochran, he died intestate. The bill prays that the fa may be declared to be held by the heirs of Lewis Howell trust for the complainants, and that they be decreed to co vey their respective shares therein to the complainants, that the sums paid and advanced by the complainants shou be declared to be a lien upon the said farm, and that t same should be sold for the payment thereof.

The case made by the bill is very fully established the evidence. The complainants purchased the farm, pa the purchase money, excepting the portion raised by t father upon mortgage, and have since occupied the far making permanent improvements, and taking the rents a profits for their own use. It is shown that the father alwa treated and spoke of it as his sons', and disclaimed all inter in it as his own property.

It is a well established doctrine of equity, that whe upon the purchase of real estate, the title is taken in t name of one person, and the purchase money is advanced

another, the parties being strangers to each other, there is a resulting trust in favor of the party from whom the consideration proceeds. *Hill on Trustees* 91; *Adams' Equity* 33; *Story's Eq. Jur.*, § 1201.

The application of the principle to this case is not affected by the relation subsisting between the parties. Where the purchase is made, and the money advanced by the father, and the title taken in the name of the son, the purchase would be deemed an advancement. The presumption in favor of the advancement arises not only from the relation between the parties, but from the moral obligation of the father to provide for the son. But where the purchase is made, and the money advanced by the son, and the title taken in the name of the father, the relation of the parties will not defeat the resulting trust. *Adams' Eq.* 35; *Story's Eq. Jur.*, § 1203.

The trust must arise at the time of the making of the deed; and if part only of the consideration be paid at the time by the party claiming the benefit of the trust the trust results in their favor only to that amount, though they subsequently pay the whole of the purchase money. But in this case the whole purchase money must be regarded as paid by the complainants. The transaction between the sons and the father must be regarded as a loan or an advancement by the father to the sons, to enable them to make the purchase. The sons were to provide for the debt incurred by the father, and they did provide for it by paying the interest as it accrued, the principal being not yet due. At the time of the transaction, the father had made his will, by which he had devised the farm upon which he gave the mortgage to the the complainants, upon condition of their paying all the debts of his estate. That will continued in force at his death. The very money, therefore, which the father furnished was at the time of the transaction, and still is an encumbrance upon the lands devised to the complainants. But the will was executed before the lands now in question were purchased, and it contains no residuary or other clause which

will vest the title in the sons. Had that been done, the design of the transaction would have been effected, and the intention of the parties carried into effect. But as the title now stands, the sons advanced the purchase money, and the lands descend, as the estate of the father, equally to all his children and their representatives.

Although it is necessary to create the trust that the funds should be paid by the *cestui que trust* at the time of the purchase, yet they may be supplied by a third person, or even by the nominal purchaser, on credit. *Page* v. *Page*, 8 *N. Hamp.* 187: *Runnells* v. *Jackson*, 1 *Howard* (*Miss.*) 358.

So the trust will result, though a part of the money be paid in cash, and a note given for the residue. *Lounsbery* v. *Purdy*, 16 *Barb. S. C.* 389.

The heirs-at-law of Lewis Howell, the father, who are made defendants, will be declared to be trustees, as to their respective shares, for the complainants, and will be decreed to convey their respective shares to them. As the land mortgaged by the father is devised to the complainants subject to all the debts of the estate of the testator, it would seem that the interests of all the heirs are sufficiently protected against any prejudice from the debt incurred by the testator in favor of the complainants. But to gaurd against any possible contingency, it will be proper so to frame the decree as to require the conveyance to be made to the complainants subject to the payment of the mortgage debt, or after that debt shall have been satisfied by the complainants, and the estate discharged therefrom.

WILLIAM MCDERMOTT *vs.* MARY I. FRENCH and others.

The husband is a necessary party to a bill filed by the grantee of the husband against the wife for the partition of lands alleged to have been held by the husband and wife as tenants in common. The wife can only defend the suit jointly with her husband, except under special circumstances.

McDermott *v.* French.

A wife, though living separate from her husband, even though she has been separated by deed, cannot be sued alone: her husband must be joined, if only for conformity.

If an estate in fee be given to a man and his wife, or a joint purchase be made by them during coverture, they are neither properly joint tenants nor tenants in common, for they are in law but one person, and cannot take by moieties. They are both seized of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole. A conveyance by either alone is inoperative.

The estate thus vested in the husband and wife by a conveyance to them during coverture is not affected by the act of 1812 respecting joint tenants and tenants in common (*Nix. Dig.* 136, § 34). That act extends to joint tenancies only, and not to tenancies by entireties.

But when an estate is conveyed to a man and woman before marriage, who afterwards intermarry, as they took by moieties they will continue to hold by moieties after marriage.

So it seems that a husband and wife may, by express words, be made tenants in common by gift to them during coverture.

When a bill for partition alleges that the husband and wife were seized as tenants in common by virtue of a conveyance to them made during coverture, that fact is not necessarily inconsistent with the creation of a tenancy in common, and on demurrer to such a bill it will be assumed that apt words were used in the conveyance for that purpose. If in truth the conveyance was made to the husband and wife during coverture, and apt words for the creation of a tenancy in common were not used, the fact should be shown by way of plea.

T. N. McCarter, for the demurrer.

D. A. Hayes, contra.

THE CHANCELLOR. A demurrer is filed to a bill for partition, brought by a grantee of the husband against the wife.

The first ground of demurrer is fatal. The husband is a necessary party. The wife cannot be sued alone. She can defend the suit, except under special circumstances, only jointly with her husband. *Mitford's Eq. Pl.* 105; *Story's Eq. Pl.*, § 71.

The rule observed in recent cases is, that a wife though living separate, even though she has been separated by deed, cannot be sued alone; her husband must be joined, if only for conformity. *Calvert on Parties* 269.

The second ground of demurrer is, that the estate in

question is not susceptible of partition. The bill alleg that the husband and wife were seized in fee of the premis as tenants in common, by virtue of a certain indenture, ma and executed by Samuel D. Burchard and Agnes his wi bearing date on the first day of September, 1858; and th on or about the first day of September, 1860, the husbar so being seized as tenant in common with the wife, by i denture, under his hand and seal, conveyed to the complai ant all the right, title, and interest of the husband in t premises.

If an estate in fee be given to a man and his wife, or joint purchase be made by them during coverture, they a neither properly joint tenants nor tenants in common, f they are but one person in law, and cannot take by moieti They are both seized of the entirety, and neither can s without the consent of the other, and the survivor takes t whole. *Co. Litt.* 187, *a, b;* 2 *Cruise's Dig., tit.* 18, *ch.* 1 46; 5 *Cruise, tit.* 36, *ch.* 7, § 27; 2 *Bla. Com.* 182; 2 *Ken Com.* 132; *Green ex dem. Crew* v. *King,* 2 *Black. R.* 121 *Den* v. *Hardenbergh,* 5 *Halst.* 42.

Where a husband and wife are thus seized of the entiret a conveyance by either is inoperative. *Back* v. *Andre, Vern.* 120; *Doe* v. *Panatt,* 5 *Term Rep.* 654; *Jackson Stevens,* 16 *Johns. R.* 115; *Rogers* v. *Benson,* 5 *Johns. C.* 437; *Dias* v. *Glover,* 1 *Hoffman's Ch. R.* 76.

And the estate thus vested in the husband and wife, a conveyance to them during coverture, is not affected by t act of 1812 respecting joint tenants and tenants in commc *Nix. Dig.* 136, § 34. That act extends to joint tenanc only, and not to tenancies by entireties. *Den* v. *Hardc bergh,* 5 *Halst.* 47; *Shaw* v. *Hersey,* 5 *Mass.* 521; *Jacks* v. *Stevens,* 16 *Johns. R.* 110.

But where an estate is conveyed to a man and wom before marriage, who afterwards intermarry, as they to by moieties, they will continue to hold by moieties aft marriage. 1 *Inst.* 187, *c; Moody* v. *Moody, Ambler* 649.

So it seems that a husband and wife may, by expr

words, be made tenants in common by gift to them during coverture. 4 *Kent's Com.* 363; 1 *Preston on Estates* 132; 2 *Bla. Com.* 182, *Sharswood's note.*

The bill alleges that the husband and wife were seized as tenants in common by virtue of a conveyance made to them. Even, therefore, if it appears by the bill that the conveyance was made during coverture, that fact is not absolutely inconsistent with the creation of a tenancy in common. As there is a direct averment that the conveyance created a tenancy in common, it must be assumed that apt words were used in the deed for that purpose. This objection cannot prevail upon demurrer. If in truth the conveyance was made to the husband and wife during coverture, and apt words for the creation of a tenancy in common were not used, the fact should be shown by way of plea.

Upon the first ground, the demurrer is allowed.

ROSS W. WOOD and RICHARD D. WOOD *vs.* JOHN A. WARNER, BERNARD VETTERLIEN, and CHARLES F. TAY.

Complainants and defendants, being joint owners of an island in the Caribbean sea, said to contain large deposits of guano, entered into an agreement that complainants should conduct the business of collecting and selling the guano for the mutual benefit of all concerned, and that the profits and losses of the business should be divided among all the parties according to their respective interests, and that complainants should have a lien on the island and all the personal property used in their business for any advances made by them. The business generally proving unprofitable, the complainants filed their bill against the defendants (who are citizens of this state, and appeared regularly to the suit,) praying an account and a decree against the defendants for their proportion of the losses, and for a sale of the island, its contents, and the personal property connected therewith—

Held, that it is no objection to the court's taking an account, and making a decree in the cause, that the property is out of the jurisdiction of the court, so that the decree cannot be enforced *in rem.*

The strict primary decree of a court of equity is *in personam*, and not *in rem*, and the authority of this court to deal with contracts in relation to land not within the jurisdiction of the court is fully established.

Wood v. Warner.

The contract between the parties and the circumstances of the case *held* to be such as to entitle the complainants to close their operations, and seek an account and settlement in this court.

Williamson, for complainants.

Zabriskie, for defendants.

THE CHANCELLOR. The bill of complaint charges that, in the year 1857, Ross W. Wood, one of the complainants, and Alexander H. Grant, copartners in trade in the city of New York, under the name and style of Wood & Grant, became interested in the island of Sombrero, an uninhabited island in the Caribbean sea, said to contain large and valuable deposits of guano; that John E. Gowan & Co., of Boston, claiming to have taken possession, and to be the owners of said island, and to have taken the necessary steps with the state department of the government of the United States to insure the protection of said island to the said John E. Gowan & Co., and Andrew C. Elliott, and one George R. Field, also claiming to have some right or title in said island, it was agreed between the said Wood & Grant and the said John E. Gowan & Co., Field, and Elliott, that Gowan & Co. should sell to Wood & Grant one half interest of the whole of said island, upon the following conditions, *viz.* that Wood & Grant should execute their notes for $30,000, which notes should become the property of Gowan & Co., Field, and Elliott, in the following proportions, *viz.* Gowan & Co. five-eighths, Elliott two-eighths, and Field one-eighth; that *Wood & Grant should raise a working capital of* $20,000, to be used in the business of collecting and shipping guano from said island; that upon the execution of said notes for $30,000, and agreeing to raise the said working capital of $20,000, Wood & Grant should own and be possessed of one half of the island and its contents, and all benefits to be derived therefrom; and that Wood & Grant should have the sole control of the working and management of the whole island, for the benefit of all the parties interested, and that the net profits of work-

ing the island, or the *losses arising from the sale of either the island or its contents*, should be divided as follows, *viz.* one half to Wood & Grant, one quarter to John E. Gowan & Company, and the remaining quarter to Field and Elliott. It was further agreed between the parties, *that Wood & Grant should have the sole right to sell, lease, convert into a joint stock company, or work the said island* for the mutual benefit of the parties interested. Wood & Grant, having paid the consideration agreed upon, on the fifth of August, 1857, received a deed for one half of the island. They also advanced the working capital of $20,000, and carried on the business of digging and shipping guano, for the benefit of the concern, until the twelfth of October, 1859, when their interest passed into the hands of the complainants, by whom the business continued to be carried on with the consent of the proprietors. By subsequent transfers, the complainants became the owners of three-fourths of the property invested in the enterprise, and Warner, and the other defendants holding under him, of the other fourth. The bill charges that, from the first of February, 1860, till the twentieth of July, 1861, the concern lost $55,394, and that at the latter date Warner was indebted to the complainants over $20,000; that the complainants are in possession of the island, and of a large amount of personal property connected with the business, upon which, by an agreement with Warner, they have a lien for all moneys advanced by them in carrying on the business. The prayer of the bill is, that an account may be taken; that the complainants may be paid the sum that may be found due to them; that the defendants may contribute for the advances made and losses sustained; that in default of payment, the right and interest of the defendants in the island, its contents, and the property connected therewith, may be sold to pay the complainants the amount decreed to be due them, and that they may have such other relief as may be agreeable to equity.

There is no question as to the interest of the parties, respectively, in the matter in controversy, and but little as

to the material facts upon which the complainants found their claim for relief. The questions raised by the answer relate mainly to the mode of taking the account, and as no instructions are asked upon that subject it will be unnecessary to discuss them.

The only questions submitted for decision at this time relate to the jurisdiction of the court and to the right of the complainants to an account.

Upon the question of jurisdiction I entertain no doubt. The complainants come before the court to obtain a settlement of accounts and a decree for the payment of the balance due. The defendants are all citizens of this state, and their appearance has been duly entered. It may be that the court cannot enforce its own decree in rem by making sale of the defendants' title to the island of Somhrero, as prayed for in the bill. I do not understand the complainants' counsel as insisting upon that. But that is no objection against taking an account and making a decree in the cause. The strict primary decree of a court of equity is *in personam*, and not *in rem*. In *Penn* v. *Lord Baltimore*, 1 *Vesey*, sen. 444, the court decreed the specific performance of articles of agreement between the proprietors of Pennsylvania and Maryland relating to the boundaries of the two provinces. In delivering his opinion in that case, Lord Hardwicke said: "As to the court's not enforcing the execution of their judgment, if they could not at all, I agree it would be in vain to make a decree, and that the court cannot enforce their own decree *in rem* in the present case: but that is not an objection against making a decree in the cause: for the strict primary decree in this court, as a court of equity, is *in personam*. Long before this court could issue to put into possession in a suit of lands in England, which was first begun and settled in the time of James I, but ever since done by injunction or writ of assistance to the sheriff; but the court cannot, to this day, as to lands in Ireland or the plantations. In Lord King's time, in the case of *Richardson* v. *Hamilton*, attorney general of Pennsylvania, which was a suit of land and a

house in the town of Philadelphia, the court made a decree, though it could not be enforced *in rem*. In the case of Lord Anglesey, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem;* but the party being in England, I could enforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of the court."

"The proposition," says Mr. Justice Story, "may be laid down in the most general form, that to entitle a court of equity to maintain a bill for the specific performance of a contract respecting land, it is not necessary that the land should be situate within the jurisdiction of the state or county where the suit is brought. It is sufficient that the parties to be affected and bound by the decree are resident within the state or county where the suit is brought; for in all suits in equity the primary decree is *in personam*, and not *in rem*." 1 *Story's Eq. Jur.*, § 744.

These cases establish the authority of the court to deal with contracts in relation to land not within the jurisdiction of the court.

Whether the court can at all interfere, either with the sale of the land or the disposition of the proceeds of such sale, it is unnecessary now to consider. The power of the court to decree the settlement of the accounts between the parties, and the payment of the balance, if any found due, and to enforce such decree *in personam* cannot be questioned.

It is insisted by Warner, in his answer, that by the terms of the agreement of the twenty-third of May, 1857, all advances by the complainant were to be a lien upon the property, and to be reimbursed out of the business; and that, therefore, he cannot be held responsible for any advances made beyond the value of the property. But it is expressly stipulated, by the agreement, that the *losses*, as well as the net profits arising from the sale either of the island or of its contents, shall be divided between the parties, in proportion to their respective interests in the concern. That consequence would seem necessarily to result from the very nature of the

contract, even if there had been no stipulation to that effec
The parties were in fact partners in the enterprise, and wer
to share in the profits in proportion to their respective in
terests in the capital invested. Wood & Grant, whom th
complainants represent were, by the terms of the contrac
to own one half of the island and its contents, and all benefi
to be derived therefrom, and to have the entire control
the working and management of the whole, for the benef
of themselves and all the parties interested. In the absen
of any express stipulation that Wood & Grant should be
all losses that might be incurred, or that the work should
carried on at their own expense and hazard, the fair imp
cation would be, that the losses are to be shared by all th
parties concerned in proportion to their respective interest
So far as regards a participation in profits and losses, th
contract virtually constitutes a partnership as between th
parties themselves, although there was no partnership nam
and it was expressly stipulated that no one of the parti
should have power to bind the others.

But the objection to an account was limited by couns
upon the argument, to the one ground, that in the prese
state of the business the complainants are not entitled to
account. The objection is founded on the terms of the agre
ment of the fifth of June, 1857. By the terms of th
agreement, Wood & Grant were to furnish a working capi
of $20,000, to be used in carrying on the business of colle
ing and shipping guano; they were to have the sole cont
of the working and management of the whole concern
the mutual benefit of all concerned, with the right to s
lease, convert into a joint stock company, or work for mut
benefit. It is urged that they have neither sold nor leas
and that they were therefore bound to continue to carry
the business for mutual benefit, and that they are not entit
to an account before the close of the business; that a co
of equity will not permit them, merely because the busin
is depressed and temporarily unproductive, to close ope
tions under their contract, to call their associates in

enterprise to an account, and strip them of their interest in the concern.

If this contract constitutes a partnership between the parties, being indefinite in its duration, either party, upon well settled principles, had a right to terminate it at his pleasure. 3 *Kent's Com.* 53; *Gow on Partn.* 269, 275; *Story on Partn.*, § 84.

There is no evidence in the case of a fraudulent purpose on the part of the complainants in closing their operations. The bill distinctly states that the business, for some months before filing the bill, had ceased to be productive, and that very heavy losses were sustained in carrying it on. It assigns, as a leading cause of the unfortunate character of the recent operations, the failure to find a market, owing to the national difficulties, and the impossibility of making sales at the south, where the principal market had previously been found. It is obvious that in such an enterprise emergencies may arise which will not only justify, but require the cessation of the business. Such contingencies must have been within the contemplation of the parties in forming the contract. It is not denied that the complainants furnished the working capital of $20,000 according to their contract, and entered in good faith upon its performance. So far as appears the business was carried on from 1857 until the close of 1859 successfully and to the satisfaction of all concerned. If the business, from causes beyond the control of the complainants, has since proved disastrous, I see no reason why they should not be permitted, either as partners or as agents of the proprietors, to close their operations, and seek an account and settlement in this court.

But whatever obligation might have been imposed upon the complainants by the contract of 1857 to continue the business, it would seem to be discharged by the contract of the thirteenth of January, 1860. By that agreement, made between the owners of the island and William A. Howard, the island, together with all the vessels, boats, horses, implements, railroad and cars, and everything appertaining and

necessary for getting out and delivering the guano on board of the vessels, were delivered to Howard, who agreed, for a stipulated compensation, to get out and ship the guano, as instructed by the proprietors or their authorized agents This contract was, by its terms, to continue for three years from the first of April, 1860, with liberty to either party upon a reasonable cause of dissatisfaction, to terminate it It was in fact terminated by Howard, in July, 1860, before it had been in operation four months. Since that time the property has remained in the possession and under the control of the complainants.

I can see no ground upon which they can be required to carry on the business at a sacrifice of their interests, or prevented from having an account and settlement with those interested in the enterprise.

There must be a reference to a master to take the account All further equity is reserved until the coming in of the report.

JAMES HODGSON, ROBERT M. PIERCE, and BENJAMIN F HOLBROOK *vs.* JOHN W. FARRELL.

On a bill filed by defendants in attachment, and a subsequent judgmen creditor of the defendants in attachment against the purchaser at a sal of the defendant's real estate, made by the auditors in attachment to se aside the sale on account of an imperfect description of the property i the advertisement of the sale and gross inadequacy of price, it was *he* that the fact that property worth $12,000 is struck off and sold at a pul lic sale for $400, affords in itself very strong ground for equitable relie It is such gross inadequacy of price as to shock the conscience, and i amount in itself to strong evidence of fraud.

The fact that the advertisement was so framed as to mislead, so that r one not acquainted with the premises could have conjectured, from th advertisement, what the property was that was intended to be sold, i connection with the fact that there were no bidders at the sale but th purchaser, and that the property was sold at a very inadequate pric makes the sale constructively fraudulent as against the defendant i execution or others having liens upon the property, and on that accoun

constitutes a ground of equitable relief, although the advertisement may be a technical compliance with the requirement of the statute so far as to vest a valid title in the purchaser.

When, however, it appears, by the bill and answer taken together, that on account of other encumbrances on the premises they really brought a much higher price than that at which they were struck off to the purchaser, and that a resale cannot benefit the judgment creditor at whose instance, and mainly for whose benefit the injunction was issued, such resale will not be ordered, and the injunction will be dissolved.

The interest of the defendants in attachment can in no wise be affected by the price at which the property was sold, except as it leaves a larger amount of their debts unpaid, and that alone constitutes no ground for equitable relief.

This was a motion to dissolve an injunction.

P. L. Voorhees and *Dayton*, for the motion.

Wilson, contra.

THE CHANCELLOR. The bill was filed to set aside a sale of real estate, made by auditors, under a judgment in attachment against Pierce and Holbrook, to the complainants. Hodgson, the other complainant, is a subsequent judgment creditor of Pierce and Holbrook. The case made by the bill is, that the interest of the defendants in attachment in the real estate sold, which is alleged was worth $12,000, was struck off to the defendant for $400, whereby a judgment of Holbrook for $5000, which was a subsequent lien on the property, was totally lost, and the debt of the defendants in attachment remained unsatisfied; that the notice of the auditors' sale was imperfect and insufficient; that the purchaser was the only bidder at the sale, and that each parcel of the premises, as sold, was struck off at a single bid of $100, made by the defendant.

The first ground relied upon for dissolving the injunction is, that there is no equity in the bill. The fact that real estate charged to be well worth $12,000 is struck off and sold at a public sale for $400 affords, itself, very strong ground for equitable relief. It is such gross inadequacy of

price as to shock the conscience, and to amount, in itself, to strong evidence of fraud. 2 *Story's Eq. Jur.*, § 246; 3 *Stockt.* 233.

But the equity of the complainants' bill does not rest upon the ground of mere inadequacy of price. The notice of the sale is imperfect. The advertisement is headed "Auditors sale of *land and water rights*," in large capitals. The property to be sold is described as the right, title, and interest of the defendants, Robert M. Pierce and Benjamin Holbrook, in and to "the following described premises, situate in Mullica township, Atlantic county, New Jersey, being a mill stream and pond, commonly known as 'Pleasant Mills,' together with the water rights to the same belonging. Also two hundred acres of land adjoining the said mill stream and pond." Besides the land and water rights, the property sold consisted of a new and extensive paper mill and machinery, a saw mill, mansion house, store, and twenty dwelling houses. These constituted its chief value. It is obvious that the advertisement was not only defective, but was calculated to mislead. No one not acquainted with the premises could have conjectured, from the advertisement, what the property was that was intended to be sold. No sane man desirous of effecting an advantageous sale of the premises would have advertised the property in the terms used in the notice of sale. It is no answer to say, that the property was designated in the advertisement as "Pleasant Mills," by which title the property was familiarly known in that region of country—a purchaser for that description of property was not likely to be found in the immediate vicinity; and to make that fact of any importance, it should appear that it was known to manufacturers and capitalists elsewhere by that description. But a more decided answer appears upon the face of the bill. The principal manufactory at Pleasant Mills, for many years, was a *cotton mill*, which was burnt and the *paper mill* has been recently built in its place. To advertise it therefore simply by its name was calculated to mislead rather than to attract purchasers. It was certainly

giving no definite information to the public of what was intended to be sold.

In *Allen* v. *Cole*, 1 *Stockt.* 286, which was a bill filed to set aside a sheriff's sale, and for a resale on the ground, among others, of illegality in advertising the property, the Chancellor said, "the advertisement of the sheriff was in strict compliance with the law. It sufficiently identified the property. The sheriff was not bound to describe the number of buildings or their character." Unfortunately the report does not disclose what the advertisement was nor of what the property consisted. On reference to the original bill on file, it appears that the property consisted of houses and lots in the city of Camden. In regard to some of the lots, the advertisement includes a description of the buildings upon it. But one of the lots, after describing it generally, is advertised to be sold with the buildings upon it, with certain specified exceptions. Now the opinion must be taken as applicable to that description, and so far its soundness is not questioned. The property, so far as appears by the case, was *sufficiently* identified. The question is not whether the advertisement is a technical compliance with the requirement of the statute, or whether the defect is such as to invalidate the title in the hands of the purchaser, but whether the character of the description, in connection with the fact that there were no bidders at the sale, and that the property sold at a very inadequate price, does not make the sale constructively fraudulent, as against the defendant in execution or others having liens upon the property, and does not, on that account, constitute a ground of equitable relief. I have no hesitation in saying that it does, even though the advertisement be a compliance with the requirement of the statute so far as to vest a valid title in the purchaser. Thus an advertisement of a town lot by its street and number would be sufficient to identify the lot. But if, under such advertisement, the sheriff should sell a costly dwelling at a price not exceeding the value of the lot, in the absence of all competition, it would afford ground for relief.

So if, under an advertisement of a water power and tw hundred acres of land, the sheriff, in the absence of all com petition, sell a valuable manufactory and machinery at merely nominal value, it surely affords ground for relief i equity. I entertain no doubt that the case made by the bi called for the interference of the court. The injunction wa properly issued, and cannot be dissolved for want of equit in the bill.

But it is further urged that the equity of the bill is ful denied by the answer. The equity of the complainants' ca rests upon the charge of a defective or erroneous descripti of the premises in the advertisement, the consequent absen of all competition at the sale, and a sacrifice of the proper to the prejudice of the complainants' rights. The bill charg that the premises sold were subject only to an encumbran of $11,000, and though it does not expressly aver, yet i phraseology is calculated to create the impression that th judgment of Hodgson for $5000 was the next encumbran in order and priority to the judgment in attachment; where it appears, by the answer, that there were other encumbranc upon the premises, and that the purchaser held a mortga upon the property prior to Hodgson's judgment, upon whi there was due, at the time of the sale, over $10,000. Ha that fact appeared by the bill, the injunction would not ha been granted. It satisfactorily accounts for the price which the property was sold, and shows that instead of sel ing for $400, the interest of the defendants virtually brougl more than $5400. It explains the absence of all competitic at the sale; for it is apparent that no one, however desiro of purchasing, could have bought the property without bi ding over the amount of Farrell's encumbrance. Nothing more usual than the striking off of real estate at a sheriff sale to a subsequent encumbrancer at a price barely suf cient to satisfy the amount due upon the execution und which the sale is made. The answer moreover shows th the offer of the complainants, if the property should be aga offered for sale, to bid an amount beyond the claim of th

attaching creditor is merely illusory; for Farrell, the mortgagee, must of necessity for his own protection bid far beyond the amount of the judgment in attachment under which the premises were sold. The averments of the bill and answer show satisfactorily that a resale cannot benefit Hodgson, the judgment creditor, at whose instance and mainly for whose benefit the injunction issued.

The complainants allege, in their bill, that they had not notice of the time and place of sale, but they do not allege that neither of them had notice. The averment may be true, and yet Pierce and Holbrook, the owners of the property, may have had full notice. It is fair to infer, from the phraseology of the bill and from the averments of the answer, that they had actual notice of the time and place of sale; and if they had not, it was the result of their own negligence or inattention. Their interest, moreover, can in no wise be affected by the price at which the premises were sold, except as it leaves a larger amount of their debts unpaid. But this alone constitutes no ground for equitable relief.

The injunction must be dissolved with costs.

HANNAH B. DOWNING and SARAH B. DOWNING *vs.* DAVID RISLEY and SARAH P. MORSE.

On a bill filed by the heirs-at-law of a deceased vendee by parol contract against a purchaser claiming by a subsequent deed from the vendor, charging such purchaser with notice of the parol contract of sale, and praying a decree for specific performance against such purchaser, it was *held* that the administrator of the vendee was a necessary party to such a suit where the personal estate was small, the estate still unsettled, and it does not appear that the debts of the deceased vendee have been paid. The administrator is not only liable for the purchase money, and interested in disputing the contract, but he has an equitable interest on behalf of creditors in the real estate of his intestate paramount to that of the heirs. All persons interested in the contract should be made parties to the proceeding.

The fact that the heirs are also *bona fide* creditors of the vendee, however

it may strengthen their claim to equitable relief, cannot aid the defect in the bill for want of parties.

The defendant did not take his title directly from the vendor, but from one S. P. M., to whom the vendor made title, and who was originally a party to the bill, but died pending the suit. It appeared, however, that S. P. M. was a mere trustee for the defendant. *Held* that the conveyance by S. P. M. to the defendant was a mere execution of the trust, and that it was unnecessary to make the representatives of S. P. M. parties to the suit.

There is no difficulty in enforcing the specific performance of the contract against the alienee of the vendor. Where the alienee has notice of the original contract at the time of the alienation, he is liable to its performance at the suit of the vendee. If he is a purchaser with notice he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree

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Browning, for complainant *ex parte*.

THE CHANCELLOR. The bill charges that, in the year 1854 Benjamin C. Downing, by a parol agreement, purchased of John Leeds, for the consideration of $200, a lot of land in Atlantic City; that with the consent of the vendor, and in part performance of the contract, the purchaser entered into possession, and erected upon the premises, at a cost of about $3000, a boarding house, and continued in possession thereof till his death; that no deed was made to the purchaser, but that in 1859, David Risley, without the knowledge of the purchaser, fraudulently procured a deed for the premises to be made by Leeds, the vendor, to Sarah P. Morse and by Sarah P. Morse to himself. Downing, at the time of these conveyances, was in possession of the premises, and both Risley and Morse well knowing the agreement for the purchase by Downing and his equitable title to the premises. The bill prays that Risley may be decreed to convey the premises to the complainants, upon the payment to him of the purchase money with interest. Downing, the purchaser, died intestate and in possession of the premises.

Without calling in question the title of the complainant to equitable relief, I think the bill is defective for want of parties. The bill is filed by the heirs of the vendee. It ap

pears, by the bill, that administration has been granted upon his estate in the county of Atlantic, and that his personal estate is very small. It does not appear that the estate has been settled, or that his debts have been paid. Under such circumstances it is necessary that the administrator should be a party to the bill. He has an interest in disputing the contract, and is the party liable to pay the purchase money. *Buckmaster* v. *Harrop*, 7 *Ves.* 341; *Fry on Spec. Perf.*, § 118.

If the bill had been filed by the vendor for the specific performance of the contract, there can be no doubt that the personal representative must have been made a party. He alone, and not the heirs, would have been liable for the purchase money.

The difficulty is not overcome by the offer, on the part of the complainants, to pay the purchase money. The administrator is not only liable for the purchase money, and interested in disputing the contract, but he has himself, by our law, an equitable interest in behalf of the creditors paramount to that of the heirs. Upon a deficiency of the personalty, the real estate is assets for the payment of debts. It devolves upon the heirs charged with that encumbrance. It may be sold at the instance of the administrator. All persons interested in the contract should be made parties to the proceeding.

This principle was recognized and applied in *Anshutz's appeal*, 34 *Penn. St. R.* 375. In that case application was made, by the administrator of the vendor, to enforce the specific performance of the contract against an heir of the vendee, who had purchased in the interest of the other heirs. It was held that the administrator and the heirs of the vendor, and all persons deriving title from them or interested in the contract, should be made parties to the proceeding, and that notice should also be given to the heirs of the vendor.

There is an allegation in the bill that the complainants are creditors, as well as heirs of the purchaser, having advanced a large sum of money to aid in the erection of the

house built upon the premises. But it is not alleged th they are judgment creditors, or that they have any lien up the land, legal or equitable, which can give any preferen over other creditors of the intestate.

The bill is not in the nature of a creditor's bill for t benefit of all the creditors, or of such as will unite in t suit, but is filed for the benefit of the complainants alo It is not perceived that the fact of their being *bona f* creditors of the purchaser, however it may strengthen th equitable claim to relief, can aid the defect in the bill want of parties.

Sarah P. Morse has died since the institution of the su I do not perceive that she had, at the time of her death, a transmissible interest in the premises, or that, under frame of the bill, it is necessary to make her representati parties to the suit. If it be true, as charged in the b that the consideration of the conveyance from Leeds Sarah P. Morse was advanced by Risley, there was an plied trust in his favor. The land was held by the gran in trust for Risley. The conveyance to Risley, with without consideration, was a mere execution of the tru

The exhibits have not been furnished to me, but it is sumed that the deed from Sarah P. Morse to Risley is wi out covenants of warranty.

There is no difficulty in enforcing the specific performa of the contract against the alienee of the vendor. Wh the alienee has notice of the original contract at the time the alienation, he is liable to its performance at the sui the purchaser. If he is a purchaser with notice, he is lia to the same equity, stands in his place, and is bound to that which the person he represents would be bound to do the decree. *Taylor* v. *Stibbert*, 2 *Vescy, jun.* 439; *Fry Spec. Perf.*, § 135, 137.

I purposely avoid the intimation of any opinion upon question, whether, as general creditors, the complain might enforce the performance of the contract: and if

whether that may be done for their own benefit, in exclusion of other creditors. It is enough to say that the bill is not framed in that aspect.

WILLIAM S. BANTA, administrator of Jane Ann Moore, deceased, *vs.* JOHN L. MOORE.

J. A. M., domiciled in New Jersey, died intestate. Letters of administration on her estate were granted to the complainant, in the place of the domicil of the intestate. The defendant, a brother and one of the next of kin of the intestate, obtained possession of some of the personal property of the deceased, consisting of bonds and stock of the Buffalo, New York, and Erie Railroad, a bond of the New York and New Haven Railroad Company, and a note or notes of a brother of the intestate, who resided in New Jersey, and procured administration of the personal estate of the intestate to be granted to him by the surrogate of the city and county of New York. Complainant filed his bill in this court against the defendant, alleging the above facts, and also that defendant had received other considerable sums of money in New York as administrator; that there were no debts, and praying a discovery and account of the amount in the defendant's hands, and a decree that he pay over such amount to the complainant. On a demurrer to this bill, it was *held*—

That, as the intestate left assets both in New York and in this state, administration was rightfully granted in both states, although the right of succession to the personal estate is to be regulated by the law of the domicil.

Administration of the estate must be in the jurisdiction in which possession of it was taken and held under lawful authority, and when there are two administrators in different countries, each portion of it must be administered in the country where possession of it was so taken.

The person to whom administration is granted is bound to administer the estate and pay the debts of the deceased. His duties remain the same though the intestate may have been domiciled elsewhere. The right of administration is irrespective of the domicil of the intestate.

The validity of the letters of administration in New York not being called in question, the claim of the complainant, that the defendant having, as such foreign administrator, collected funds of the intestate, is bound to account for them to the administrator in this state, to be administered here, is without foundation in principle.

The bill alleges that, as to one or more of the securities taken and held by defendant, the debtor resided and still resides in this state. The foreign

administration gave no title to these securities as against the administrator in this state. The bill prays a discovery and account as to the securities and for that purpose it can be maintained.

The demurrer is too general: it is applied to the whole bill, but is good to part only and must be overruled.

Zabriskie, for complainant.

Gilchrist, for defendant.

THE CHANCELLOR. The bill charges, that on or about the [illegible] day of June, 1858, Jane Ann Moore, the complainant's intestate, died at Hackensack, in the county of Bergen, where she resided at the time of her death, and where she had resided for nearly the whole of her life. She died intestate, leaving her mother, several brothers and sisters, and the children of a deceased brother, her next of kin. At the time of her death she was possessed of and entitled to personal property of the value of several thousand dollars, consisting, in part, of railroad stock and bonds, and of notes particularly specified in the bill: and the bonds, scrip, notes, and evidences of her title to said property were, at the time of her death, in her possession at her residence in Hackensack. Administration upon her estate was granted to the complainant, by the surrogate of the county of Bergen, on the twenty-fifth of January, 1860. Shortly after the death of the intestate, John L. Moore, one of her brothers and next of kin, took from her effects and papers, in the house where she resided at her death, three bonds of the Buffalo, New York, and Erie Railroad for $1000 each: two certificates of stock of said company; a bond of the New York and New Haven Railroad Company for $1000; a note or notes of her brother, Charles Moore, who also resided at Hackensack, for $575 or thereabouts, and procured administration of the personal estate of the said intestate to be granted to him by the surrogate of the city and county of New York; that the said John L. Moore, after said grant of administration to him,

and by virtue thereof, disposed of said four railroad bonds, and collected a large amount of interest due thereon, sold the railroad stock, and also collected and received from the city chamberlain of the city of New York $803.35, deposited with him, due and belonging to said intestate, or which became due to her estate by the death of her mother, on the third of January, 1860, and also collected and received $1250 for the interest of the intestate in the ship Jamestown, and he still retains the said note or notes of Charles Moore.

The bill insists that, by reason of the residence of the intestate in the county of Bergen at the time of her death, the right and jurisdiction of granting administration of her personal effects was in the surrogate of said county and in the Ordinary of this state, and that the right and jurisdiction of settling the accounts of said estate, and of decreeing distribution thereof, was exclusively in the Orphans Court of said county and in the Prerogative Court of this state, and that such distribution could only be made according to the laws of the state of New Jersey, the domicil of said decedent; that auxiliary letters of administration might be granted in other states and jurisdictions to collect and get possession of the property, choses in action, or other assets situate in such jurisdiction, but that the same must be paid over to the administrator appointed by the jurisdiction in the state of the intestate's domicil.

The bill further charges, that the said John L. Moore has not paid out of the moneys so received by him any debts owing by the said decedent, she not owing any at her death, and has only accounted to the next of kin of the decedent for a sum not exceeding $1200; that he neglects to settle up said estate, and refuses to pay over the personal estate in his hands to the complainant, who, as administrator in the place of domicil, is entitled to receive the same, but has converted the same to his own use; and that he retains the notes of the said Charles Moore, and that, by reason thereof, the amount due thereon will be lost.

The bill prays a discovery of the securities and property

of the intestate taken by the defendant, and of the amount collected by him, and an account of the amounts received by the defendant, and for which he is accountable, and that he may be decreed to pay the same to the complainant, as administrator of said intestate, to be distributed among her next of kin according to law.

To this bill the defendant demurs.

Upon the facts disclosed by the bill, it is clear that the complainant's intestate died leaving assets both in New York and in this state. Administration was rightfully granted in both states. The domicil of the intestate was in this state. The right of succession to the personal estate is to be regulated by the law of the domicil. But by whom are the assets to be administered, by the administrator in this state or by the administrator in New York?

The principle is well settled, that the administration of the estate must be in the jurisdiction in which possession was taken and held of it under lawful authority; and where there are two administrators in different countries, each portion of it must be administered in the country where possession of it is taken under lawful authority. 1 *Williams on Ex'rs* 356; 2 *Ibid.* 1414.

The person to whom administration is granted is bound to administer the estate and pay the debts of the deceased. His duties remain the same though the intestate may have been domiciled elsewhere. The right of administration is irrespective of the domicil of the intestate.

Thus, where the domicil was in India, the administrator, under letters granted in India, was held entitled to hold all the property in India at the intestate's death, though afterwards transmitted to England, against the administrator appointed in England, though needed to pay debts there. *Currie* v. *Buchan*, 1 *Dowl. & Ry.* 35.

On the other hand, where the testator was domiciled in Scotland, and administration was granted upon the personal estate in England, it was held that the trustees under the will in Scotland could not call the personal estate out of the

hands of the administrator in England, but that it must be administered in England by virtue of the letters of administration. *Preston* v. *Lord Melville*, 8 *Clark & Fin.* 1.

The subject has been elaborately discussed, and the principle fully established by the highest judicial authority in this country. *Harvey* v. *Richards*, 1 *Mason* 381; *Vaughan* v. *Northup*, 15 *Peters* 1; *Story's Conf. of Laws*, § 513, 513 *a*; 2 *Kent's Com.* 431—435.

Where administration has been granted in the place of the testator's domicil, and auxiliary administration for the purpose of collecting debts has been granted in a foreign jurisdiction, where the personal estate, or any part of it, may be situated, or the debtor resides, all that can be required, if the fund in the hands of the foreign administrator is needed for the purposes of due administration in the place of the domicil, is its transmission or distribution after all the claims against the foreign administration have been duly ascertained and settled. *Story on Conf. of Laws*, § 518; 2 *Williams on Ex'rs* 1415.

The principle, that the personal estate of the intestate, wherever it may be, constitutes assets, and that assets in any part of the world constitute assets in every part of the world, is not called in question. The only question is, by whom the assets are to be administered. Nor is it designed to call in question the right of the administrator in the place of the domicil, where foreign administration has not been granted to sell and transfer the securities that may come into his hands, and to collect debts due the intestate, wherever the debtors may reside. For the purposes of this inquiry, it will be assumed that all the railroad bonds and negotiable securities of the intestate which came to the hands of the administrator in this state might have been lawfully transferred, and all debts due collected wherever the debtor resided, and the proceeds administered as assets here. But it is admitted that none of the securities ever came to the hands of the administrator in this state to be assigned or sold by him, and it is also certain that the admin-

istrator could not, by virtue of the letters of administratio granted in this state, have enforced the collection of debt due from debtors residing in New York. That could onl have been done by virtue of letters of administration grante there. The bill admits that the securities were transferrec and the debts due in New York were collected by virtue c the letters of administration granted in that state. The va lidity of those letters, and the right of the administrator t collect the funds within that jurisdiction, is not called i question by the bill; but it is claimed that the administrato having collected the funds, is bound to account for them t the administrator in this state, to be administered here The claim, as has been said, is without foundation in prin ciple. Neither administrator has a claim against the fund in the hands of the other. Each administrator is to b called to account for the funds in his hands in the jurisdic tion where he was appointed. It was suggested, upon th argument, that the time limited by law for settlement b the administrator in New York had elapsed, and the pre sumption must be that the estate there has been duly admin istered and settled. There is no such averment in the bill On the contrary, it is expressly alleged that the adminis trator in New York has neglected to make settlement. Th proper mode of relief would seem to be to require him t make settlement in that state. It is clear that the adminis tration cannot be withdrawn from his hands, nor the settle ment of his accounts transferred to this court from th appropriate tribunal in the state where the administratio was granted.

It is charged, in the bill, that the securities in controversy shortly after the death of the intestate, were taken by th defendant, who was one of her brothers and next of kin from her effects and papers in the house where she reside at her death. It is not perceived that this circumstance ca materially affect the merits of the controversy. It does no appear that they were wrongfully taken. As a brother an one of the next of kin entitled to administer, the defendan

might lawfully have taken them. It is not even alleged that they were taken without the consent or against the will of any of the next of kin. So far as appears by any averment in the bill, they may have been taken by the consent of all parties interested, for the purpose of being administered upon. But if the fact were otherwise, and they were removed without consent by one of the next of kin for the purpose of administration, and were rightfully used and appropriated in the course of administration, the circumstances under which they were obtained constitute no ground of equitable relief.

In regard to one or more of the securities alleged to have been taken and held by the defendant, it is charged that the debtor resided, and still resides in this state. To these securities it is clear that the foreign administration gave the defendant no title. They constituted no assets to be administered by him. He has no title, legal or equitable, to them as against the administrator in this state. As to these, the bill prays a discovery and an account, and the complainant is entitled to relief. The court will not turn the party round to an action at law, even if that be maintainable. The remedy here is more complete and effective. *Story's Eq. Pl.*, § 64 *k*, 67.

The demurrer is too general. It is applied to the whole bill, but is good as to part only, and must be overruled. *Story's Eq. Pl.* 443; *Cooper's Eq. Pl.* 12.

SAMUEL T. BANTA *vs.* THOMAS B. VREELAND and ANN VREELAND.

On a bill filed for the foreclosure of a mortgage, in which it is alleged that the mortgage had been cancelled, and with the bond had been surrendered to the defendant by mistake, under a mistaken apprehension that the mortgage debt had been satisfied, when in truth it had not—

Held that the voluntary cancellation of the securities by the holder is a very strong circumstance, which can only be overcome by clear evi-

dence; but that the evidence in this case shows satisfactorily that the mortgage has never been paid.

Equity will relieve where an instrument has been delivered up or cancelled through fraud or mistake.

The present case does not fall within the principle, that to entitle the part to relief on the ground of mistake, it must be of such a fact as he could not by reasonable diligence have obtained knowledge of.

Zabriskie, for complainant.

Gilchrist, for defendants.

THE CHANCELLOR. The bill is filed to foreclose two mortgages upon the same premises. The first was given by Jacob C. Vreeland to Conrad Vreeland, dated the thirteenth of March, 1844, for $300, and assigned to the complainant by the executor of the mortgagee. The second was given by Jacob C. Vreeland to the complainant, dated December tenth 1851, for $628.11. In regard to the second mortgage, there is no dispute. The first mortgage was cancelled of record and the bond and mortgage surrendered by the complainant to the defendant on the seventeenth of October, 1860. The bill, which was filed a few days after the cancellation, alleges that this cancellation of the mortgage was made by the complainant under a mistaken apprehension that the mortgage had been satisfied, when in truth it had not. The truth of this averment constitutes the material inquiry in the cause.

Was that mortgage debt ever paid?

The mortgaged premises, on the seventeenth of November, 1856, were conveyed by Jacob C. Vreeland, the mortgagor, to his brother, Thomas B. Vreeland, the defendant. The mortgage was surrendered and cancelled of record on the seventeenth of October, 1860. The evidence shows clearly that nothing was paid upon the mortgage, nor was it satisfied in any way by any act done, or arrangement made at the time of the cancellation. It was cancelled under the belief that it had been paid long before. If so, when, how, and by whom was it paid? It would naturally have been paid either by the mortgagor himself, or by the defendant, who

purchased the premises from the mortgagor. The defendant, by his answer, expressly admits that he never paid the mortgage debt, or any part of it, but alleges that he has been informed, and believes that the debt was paid, or secured to be paid, or in some other way arranged, satisfied, and discharged, either by the mortgagee, the mortgagor, or by some other person, but when or how the defendant has been unable to ascertain.

The bill charges that, at the time of the conveyance of the mortgaged premises to the defendant by the mortgagor, the mortgage was unpaid, and a lien upon the premises; and that the defendant assumed the payment of the debt, as a part of the consideration of the conveyance. This is expressly denied by the answer. The direct issue thus made by the pleadings is, whether the mortgage in controversy was a subsisting lien upon the mortgaged premises at the time they were conveyed to the defendant. If it was, we have his explicit acknowledgment that it has not since been paid.

The mortgaged premises were conveyed to the defendant on the seventeenth of November, 1856. The cancellation was made on the seventeenth of October, 1860. If the debt was paid before, or at the time of the conveyance, the bond and mortgage would then, in the usual course of business, have been delivered up and cancelled. But they remained in the hands of the complainant for four years afterwards in full force, unquestioned either by the obligor in the bond, or by the defendant, who owned the mortgaged premises. If paid, it must have been by the obligor, or with his knowledge. He has been examined. He is a brother of the defendant, and has no apparent motive to color or distort the evidence against him. He testifies that there were two mortgages on the property when he conveyed to the defendant. The first was a $300 mortgage, executed by his mother and himself, given in 1844 or 1845, and assigned by him, as the executor of the mortgagee, to the complainant. This is the mortgage in controversy. He distinctly admits that this mortgage was not paid, but that both mortgages were sub-

sisting encumbrances when he conveyed to the defendant. I is proved, moreover, by this witness and by John Wickham that at the time of the sale of this property by the mortgago to the defendant there was a meeting between them at th house of the complainant to settle the amount due to th complainant upon his two mortgages; that the amount wa ascertained by calculation to be over $1200, and that memorandum of the amount was made by the defendan and given to the complainant. That memorandum, in th handwriting of the defendant, is produced as an exhibit. I is as follows: "Made out by Thomas B. Vreeland—amou of both mortgages up to January 16th, 1857, is $1212.11.

The force of this evidence is attempted to be impaired b alleging that the evidence does not show that the pape were in the hands of Thomas B. Vreeland. Suppose the were not. The facts, as clearly proven, are that the mor gagor and the defendant, who was about to purchase, wei to the house of the complainant to ascertain the amount du to the complainant upon the mortgages. There was no que tion as to their existence, and no pretence that either of the had been paid. The only question was, how much was du upon them. The papers were produced, the calculation o interest was made, the amount due ascertained, reduced t writing by the defendant himself, and given to the complain ant. Whether the bond and mortgage was actually in th hands of the defendant was totally immaterial. It was i his presence open to examination. It was treated as a subsis ing debt, both by the mortgagor, who was about to sell, an by the defendant, who was about to purchase and to assum the payment of the mortgage debt as a part of the consider tion of the purchase.

It is certainly a remarkable circumstance, the effect o which can be overcome only by very clear evidence, that th complainant himself believed and acknowledged that th mortgage was satisfied, and assented to its cancellation. Bu the mistake, I think, is satisfactorily accounted for. He wa an aged man, and manifestly very ignorant of busines

There had been a proposal, at one time, to take up the mortgage in question by giving another. He had held notes for a part of the indebtedness. He was under no mistake in regard to the amount due him. For that he relied upon the memorandum given to him by the defendant. At no time did he admit that the whole amount, as now claimed, was not due. His mistake was in regard to the securities which he held for the debt. He supposed that the entire debt was covered by the last mortgage or by notes. This is very clearly shown to be a mistake.

The sole question raised upon the pleadings and evidence is, whether the mortgage is a subsisting lien upon the mortgaged premises. The evidence upon this point leaves no room for doubt.

Equity will relieve where an instrument has been delivered up or cancelled through fraud or mistake. *Miller* v. *Wack*, *Saxton* 204; *Trenton Banking Company* v. *Woodruff*, 1 *Green's Ch. R.* 117; 1 *Story's Eq. Jur.*, § 167.

It is urged, on the part of the defendant, that to entitle a party to relief on the ground of mistake, it must be of such a fact as he could not by reasonable diligence have obtained knowledge of. If otherwise, it is culpable negligence, against which equity will not relieve. 1 *Story's Eq. Jur.*, § 146; *Deare* v. *Carr*, 2 *Green's Ch. R.* 513.

The principle is usually applied in relieving against contracts entered into under a mistake, though it is doubtless susceptible of a wider application. The present case, however, does not fall within the operation of the principle. The complainant received no consideration for the act—the defendant gave none. The complainant entered into no engagement from which he asks relief. Under a mistaken impression that the mortgage was satisfied, he consented to its cancellation. It is clearly against conscience that the defendant should avail himself of the mistake to escape the payment of an honest debt.

The complainant is entitled to a decree for the mortgage debt.

JOSEPH G. BREARLEY, executor of Catharine Beatty, JEREMIAH LALOR and others.

On a bill filed to settle the construction of a will containing the followi residuary clause, *viz.* "all the residue and remainder of my *moneys* above disposed of, that is of *moneys which I have at the time of decease*, I direct to be equally divided among my children and gra children living at the time of my decease;"—"whatever personal p perty is not herein before disposed of I direct to be sold by my exe tors, and the moneys thereon arising to be divided equally between son and my two daughters," it was *held* that, by these two clause clear distinction is made between *moneys* and *personal property*. residue of the one is given to all the children and grandchildren equal what remains of the other not disposed of is to be divided equally tween the children.

It is a well settled rule of construction, that by a bequest of money, bo mortgages, promissory notes, or other securities for the payment money will not pass, unless it appears by the will or from the condi and circumstances of the testator's estate that it was her intentio pass them. The term money must be understood, in its legal or pop sense, to mean gold or silver, or the lawful currency of the country bank notes or money deposited in bank for safe keeping.

The bequest of *money* in this case does not include funds in the sav bank—that is in the nature of an investment drawing interest, an not usually subject to the immediate order of the owner.

C. S. Green, for complainant.

Beasley, for defendant.

THE CHANCELLOR. The bill is filed to settle the construc tion of the will of Catharine Beatty, and for directions t the executor in the settlement of the estate. The questio arises upon the residuary clause or clauses of the will, whic are as follows, *viz.* "all the residue and remainder of m *moneys* not above disposed of, that is of *moneys which have at the time of my decease*, I direct to be equally divide among my children and grandchildren living at the time my decease;" "whatever personal property is not herein b fore disposed of I direct to be sold by my executors, and t

moneys thence arising to be divided equally between my son and my two daughters, and in case of the decease of either of them during my life, the share which said deceased one would have taken, if living, shall go to and among his or her children, in equal parts."

By these two clauses, a clear distinction is drawn between her *moneys* and her *personal property*. The residue of the one is given to all her children and grandchildren equally; what remains of the other not disposed of she directs to be divided equally between her children.

In *Mann* v. *Executors of Mann*, 1 *Johns. Ch. R.* 231, it was held, by Chancellor Kent, that in a bequest of "moneys," there being nothing in the will to show that the testator used the word "moneys" in a different or more extended sense, it must be understood, in its legal and popular sense, to mean gold or silver, or the lawful currency of the country, or bank notes, where they are known and used as cash, or money deposited in bank for safe keeping, and not to comprehend notes, bonds, mortgages, or other securities.

The same construction has been adopted in numerous other cases, which are collected in 2 *Roper on Legacies* 282, (*ed.* 1848); 2 *Williams on Executors* 1024, (*ed.* 1849).

It is a well settled rule of construction, that by a bequest of money, bonds, mortgages, promissory notes, or other securities for the payment of money, will not pass unless it appears by the will, or from the condition and circumstances of the testator's estate, that it was his intention to pass them.

I have been unable to discover anything in the will of the testatrix, or in the circumstances of her estate, which indicate a different intent from that indicated by the natural and legal import of the terms used. It is very difficult to determine what the intention of the testatrix was in the residuary clauses. It seems highly probable, either that there was a large accumulation of money in the hands of the testatrix after the date of the will, or that the provisions of the will were adopted from previously executed wills, with-

out regard to the changes which had occurred in the condition of the estate.

There are considerations growing out of some of the provisions of the will which create an impression that the testatrix, in disposing of the residue of the money which she might have at her death, referred merely to the gold which was kept in a trunk at bank, a portion of which was given in specific legacies. But so far as any intention of the testatrix is fairly inferrible from other portions of the will, it accords with the legal import of the terms of the residuary bequests. The testatrix left $17,000 of personal estate, about one half of which is included in the residue. The estate consisted of specie and bank notes in the house, gold in a trunk at bank, money deposited in bank, money in the savings bank, bonds, mortgages, and other securities, besides household furniture and other chattels. The chattels, other than her money and securities, were specifically bequeathed.

She left three children and sixteen grandchildren, to all of whom she gave special legacies. By these special legacies, including numerous charitable bequests, she disposed of nearly one half of her estate, and disposed of the remainder by the two residuary clauses already cited, by one of which she directs the residue of her moneys to be divided equally among her children and grandchildren living at her decease. Either of these clauses, in the absence of the other, would undoubtedly carry the entire residue of the personal estate; in the one case, to her three children equally, and in the other, to all her children and grandchildren equally. Standing together, they indicate a clear intention to give a portion of her estate in each way. If the term money is extended beyond its natural and legal import to include stocks and other securities, it will include the whole estate, for the chattels were all specifically bequeathed, and the second clause will be inoperative. The first clause will include the cash in the house, whether in specie or notes, the gold in the trunk at bank, and the deposit in bank. It will not include the money in the savings fund; that is in the nature

of an investment drawing interest, and is not usually subject to the immediate order of the owner, like money deposited at bank, but can only be called in, like other investments, upon notice. Out of this part of the residuary estate must be deducted the *money* specifically bequeathed in the previous part of the will. By the phrase, "residue and remainder of my moneys," the testatrix could not have intended what should remain of her moneys after paying all the pecuniary legacies previously given; for she had given pecuniary legacies to an amount far exceeding all the moneys she had, or which there was any reasonable probability of her having at her death. To adopt this construction would necessarily defeat the legacy. Besides the natural import of the phrase is, that portion of the money which has not been previously disposed of. A bequest of the residue of the personal estate is a gift only of so much as remains after all the legacies are paid, because the entire personal estate constitutes the appropriate fund for the payment of legacies. But the money in hand does not constitute a fund for the payment of legacies, any more than the other parts of her personal estate, from which the moneys are here carefully distinguished.

The general residue of the estate will be divided, under the second clause, between the three children of the testatrix. This construction gives effect and operation to each clause and provision of the will. In no other way can that be done. The bulk of the estate is thus given equally to the three surviving children of the testatrix, who would naturally be the favorite objects of her bounty. There is a strong presumption that she did not intend to divide the bulk of her estate among her grandchildren, many of whom were minors, for no provision is made for the investment or disposition of the money until they came of age; whereas, in regard to the special bequests to her grandchildren, of much smaller amount, she has specially directed that the share of such as are minors shall be put out at interest, and paid to them as they severally come of age. Nor does there seem to be any satisfactory reason why the testatrix, in ad-

dition to a specific legacy, by way of remembrance to each of her children and grandchildren, should also have given a special pecuniary legacy to each, in nearly equal amounts, if she intended eventually to divide her whole estate equally between them. But whatever weight these considerations may be entitled to in support of the construction adopted, in giving to the term money its natural and legal import, there is clearly nothing in the will which indicates a different intent in the mind of the testatrix. I entertain no doubt, therefore, as to the proper construction of the instrument.

LETITIA GORDON *vs.* EDWARD P. TORREY and others.

In a dispute between a mortgagee and lien claimants, as to the priority of their respective encumbrances on the mortgaged premises, where it was objected to the validity of the lien that the building was not erected by the owner of the land, nor by his consent expressed in writing, and it appeared that, pending the erection of the building, the owner had conveyed away the land, but that the conveyance was merely as collateral security for the payment of a debt due to the grantee, that the deed was intended simply as a mortgage, and that on satisfaction of the debt the land was reconveyed—*held*, that these circumstances effectually dispose of the objection urged against the validity of the lien.

A change of ownership during the progress of the building does not make a new commencement of the building, nor affect the validity of the lien which attached at the commencement of the building.

Nor will the interruption of the work for a short period, and its subsequent resumption without a change of its original design and character, constitute a new commencement, or affect the attachment of the lien when the building was originally commenced.

The proceeding under the statute to enforce the lien by said deed judgment is a proceeding *in rem*. It does not create the lien any more than a proceeding and decree for the foreclosure of a mortgage. There is nothing in the statute which requires that the time of the commencement of the building, and the consequent attaching of the lien, should be specified either in the lien itself or in the record of the judgment.

It is no objection to the validity of the liens that the mortgagor procured them to be filed, or that he concealed their existence from the mortgagee at the time of obtaining the loan for which the mortgage was given. If the mortgagor was actuated by fraudulent motives, it cannot affect the

rights of the lienholders. The validity of the liens cannot depend upon the motives which suggested their being filed.

I. W. Scudder, for complainant.

Slaight, for lienholders.

THE CHANCELLOR. The bill is filed to foreclose a mortgage given to the complainant, by Edward P. Torrey, upon a house and lot in Jersey City. The only question in dispute between the parties is, whether the complainant's mortgage is a prior encumbrance to the liens of the mechanics and materialmen for work done and materials furnished in the erection of the house upon the premises. The complainant's mortgage is dated on the eleventh, and recorded on the thirteenth of April, 1861. The liens were filed between the twenty-seventh of July, and the twenty-seventh of August, inclusive, in the same year. The building was commenced, according to the testimony of Torrey, the owner and builder, in the fall of 1859. The foundation was then built. The building was resumed in the following spring about May, and completed, he thinks, in May, 1861. So far as can be ascertained from the liens filed, the work and materials which form the subject of the lien were done and furnished between September, 1860, and May, 1861.

1. It is objected to the validity of the lien that the building was not erected by the owner of the land, nor by his consent expressed in writing. The legal title was in Torrey, the builder, from the nineteenth of September, 1859, until the eleventh of August, 1860, when he conveyed it to Thomas B. Oakley. On the tenth of April, 1861, it was reconveyed by Oakley to Torrey. Torrey testifies, and the fact does not seem to be at all questioned, that he conveyed the land to Oakley merely as collateral security for the payment of a debt due from him to Oakley; that the deed was intended simply as a mortgage, and that upon the satisfaction of the debt the land was reconveyed. This effectually disposes of

the objection. But admitting the title to have been absolute in Oakley, it is not perceived that the rights of the lien-holders are affected. The building was commenced by Torrey while the title was in him. The foundation was then built. The liens attached at the commencement of the building upon the estate of Torrey, and the title passed to Oakley, and was reconveyed to Torrey subject to the encumbrance of the liens. A change of ownership during the progress of the building does not make a new commencement of the building nor affect the validity of the encumbrance. *Hern* v. *Hopkins*, 13 *Serg. & R.* 269; *Pennock* v. *Hoover*, 5 *Rawle* 207; *Edwards* v. *Derrickson*, 4 *Dutcher* 39.

Nor will the interruption of the work for a short period, and its subsequent resumption without a change of its original design and character, constitute a new commencement, or affect the attaching of the lien when the building was originally commenced. *American Fire Insurance Co.* v. *Pringle*, 2 *Serg. & R.* 138; *Hern* v. *Hopkins*, 13 *Serg. & R.* 269.

After the conveyance to Oakley, the building was continued under Torrey's directions and for his benefit. Oakley never interfered with his operations nor questioned his right, nor is he now in court setting up title in himself or questioning the right of Torrey or the validity of the liens.

2. It is objected that the time when the building was commenced is not specified, either in the lien filed or in the record of the judgment, and that the encumbrance therefore cannot attach until the actual entry of the judgment. The statute, in express terms, makes the debt a lien from the commencement of the building. *Nix. Dig.* 526, § 11. The proceeding to enforce the lien is a proceeding *in rem*. It does not create the lien any more than a proceeding and decree for the foreclosure of a mortgage creates the encumbrance. There is nothing in the statute which requires that the time of the commencement of the building, and the consequent attaching of the lien should be specified, either in the lien itself or in the record of the judgment. It would seem that any such entry either in the lien or in the judgment, except

where the fact was in some way put in issue, and found by the jury, would be unauthorized and unavailing as evidence of the fact. It is certainly a matter of regret that so material a circumstance, affecting the title to real estate as the inception of the encumbrance, should be left to depend upon the parol testimony of witnesses often deeply interested in regard to facts of equivocal character, which may constitute the commencement of a building. But so is the statute, and the court cannot add to its requirements. It may be true, as insisted by the complainant's counsel, that in the absence of parol evidence of the time of the commencement of the building the record of the judgment can furnish no evidence of the lien prior to the date of the work done, or materials furnished as specified, or to the actual entry of the judgment. But that question does not arise in the present case. The fact is unquestioned, that the building was nearly completed when the complainant's mortgage was given.

There is nothing in the case to justify a doubt in regard to the *bona fides* of the claims of the lienholders. The evidence shows that the work was done and the materials furnished as charged by the claimants, and that the debts have not been paid. This is proved, both by the evidence of the lienholders themselves and of Torrey, the owner and builder. There is nothing tending to discredit their testimony.

If it be admitted that Torrey acted in violation of good faith in concealing or in failing to disclose the existence of the liens at the time he procured the loan from the complainant for which the mortgage was given, it cannot affect the legal or equitable rights of the lienholders. Nor are those rights at all impaired, if it be admitted that the liens were filed at the instance of Torrey. He may, in perfect consistency with good faith and fair dealing, have desired that the just claims of the mechanics and materialmen should be secured upon the building, in preference to the Oakley mortgage, which he then believed, and subsequently proved to be fraudulent. But if Torrey was actuated by fraudulent motives it could not affect the rights of the lienholders. The validity

of the liens cannot depend upon the motives which suggested their being filed.

There is nothing in the evidence to affect the validity of the liens, or their priority to the complainant's mortgage.

It will be decreed accordingly.

JOHN CORLES and WIFE *vs.* PHILIP LASHLEY and JOHN ABBOTT.

When, on the foreclosure of a mortgage, an execution had been issued, which by mistake directed the sale of land not included in complainant's mortgage, nor described in his bill, and by virtue of which the sheriff had sold such land, an injunction will issue to restrain the sheriff from delivering the deed.

On a sheriff's sale of land consisting of different parcels, the general rule is, that if the land is plainly divisible, it should be sold in different parcels, so as to secure the highest price.

Motion to dissolve an injunction.

J. M. Scovel, for the motion.

Cannon, contra.

THE CHANCELLOR. The bill was filed by the complainants to restrain the delivery of a deed by the sheriff of Gloucester to Philip Lashley for three tracts of land, sold by him on the fourth of October, eighteen hundred and sixty-two, by virtue of an execution issued out of the Gloucester Circuit Court. The defendants, having answered the bill, now move to dissolve the injunction.

There is no dispute as to the material facts of the case upon which the complainants' equity rests. On the third of March, eighteen hundred and sixty-two, a bill was filed in the Gloucester Circuit by Philip Lashley to foreclose a mortgage, dated on the fourth of April, eighteen hundred and fifty-seven, given by James M. Muller and wife to John

Lashley, jun., to secure the payment of twelve hundred dollars, and by the mortgagee assigned to Philip Lashley. The mortgage covered two tracts of land, the one containing seventy-one acres, and the other containing sixty-eight acres and ninety-eight hundredths of an acre. The bill described the mortgaged premises, and prayed a decree for foreclosure and sale. John Abbott held a prior mortgage, given by John Lashley, jun., upon the same premises, and also upon a third tract, containing one hundred and ten acres. He was made a defendant to Lashley's bill of complaint, and by his answer he claimed to be a prior encumbrancer upon the premises described in the complainants' bill.

The master reported that the two mortgages were upon the same premises, and a decree was made, pursuant to the prayer of the bill, for the sale of the premises covered by the complainants' mortgage. An execution thereupon issued, not only for the sale of the premises covered by the complainants' mortgage, but also for the sale of the one hundred and ten acre tract included in Abbott's mortgage, but not covered by the mortgage of Lashley, the complainant. The sheriff advertised the three tracts for sale, as required by the execution, and on the day of sale the entire premises were offered and struck off as one tract to Philip Lashley for five hundred dollars.

At the time the bill of foreclosure was filed, the title to the one hundred and ten acre tract was in Mary Corles, the wife of John Corles, who are complainants in this suit. Neither Mary Corles, nor her husband, nor her immediate grantor, who acquired title to the one hundred and ten acre tract on the sixth of January, 1858, were parties to the bill of foreclosure.

It is evident, upon this statement of facts, that the land of Corles and wife has been sold by virtue of an execution which was not authorized by the decree nor by any of the previous proceedings in the cause. The decree properly conformed to the prayer of the bill. It directs a sale only of the premises described in the bill. The decree never is,

and upon obvious principles cannot be broader than the prayer for relief. If it is essential to the purposes of equity that land not covered by the complainants' mortgage should be sold under the decree, the bill, both in its statements and in its prayer, must be framed accordingly. The whole difficulty has arisen from a misapprehension as to the extent of the premises covered by Abbott's mortgage. It was no doubt understood to cover precisely the same premises as were included in Lashley's mortgage. This accounts for the frame of the bill and of the decree and of the mistake in the master's report.

It was suggested, upon the argument, that the injunction might be retained as to the one hundred and ten acre tract owned by Mary Corles, and dissolved as to the land actually covered by the decree. But this would serve only to embarrass and complicate still further the rights of the parties. Had the different tracts been sold separately, that course might perhaps have been adopted. But they were sold for one gross sum. How is the price for which the one hundred and ten acre tract was sold to be determined? and how is the consideration which the purchaser is to pay for the remaining tracts to be ascertained? Besides, there are equities subsisting between the owners of the different tracts which can only be settled by a proper decree.

The mode of sale appears to have been improper. The land, though held in distinct tracts by different owners, was sold in one entire parcel. The general rule is, that if the land is plainly divisible, it should be sold in different parcels, so as to secure the highest price. *Woods* v. *Monell*, 1 *Johns. Ch. R.* 505; *Merwin* v. *Smith*, 1 *Green's Ch. R.* 196.

But this point is not relied on as a ground for sustaining the injunction.

The injunction must be retained, and an opportunity afforded to have the errors in the proceedings corrected.

EXECUTORS OF ELIZABETH CLARKE *vs.* EDGAR W. CANFIELD and others.

The statute (*Nix. Dig.* 211, § 4,) which raises a presumption of the death of a person absenting himself for seven years without being heard from, was designed to furnish a legal presumption of the time of the death, as well as of the fact of the death.

In the absence of the statute, the presumption would be that the absent person is still alive. This presumption of the continuance of life only ceases when it is overcome by the countervailing presumption of death afforded by the statute, which is not until the end of seven years.

The presumption of death which arises at the expiration of seven years cannot operate retrospectively.

Browning, for complainants.

Grey, for defendants.

THE CHANCELLOR. Elizabeth Clarke, by her will, bearing date on the twenty-seventh of August, 1852, gave to her grand nephew, Edgar W. Canfield, a legacy of five hundred dollars. After other legacies, she gave the residue of her estate to Elizabeth Woolston. The testatrix died on the fourth of December, 1852, having left assets sufficient to pay all the legacies given by her will. The executors, by their bill, admit the legacy to be in their hands, but allege that they are unable to ascertain whether Canfield, the legatee, is actually dead, and if dead, whether he died before or after the testatrix. If he died before the testatrix, the legacy lapsed, and falls into the residue of the estate. If he still survives, it belongs to the legatee. If he died after the testatrix, it belongs to his infant son and sole next of kin. The bill prays that the complainants may be decreed to pay the money to the party entitled to receive the same, or that it may be invested under the order and direction of the court.

The evidence in the cause is that Canfield, the legatee, resided at Hartford, in the state of Connecticut, in the years 1836 and 1837. That about the close of 1837, or beginning

of 1838, he removed to Lumberland, in the state of Ne York, where he resided in May, 1839. In 1849, a lett was received from him, by his father, dated on the fourteent of December, 1849, but without signature and without an thing to indicate where it was written. It was believe from the postmark, to have been dated at Easton, Pennsy vania, though that is not certain, as the postmark was pa tially obliterated. Since 1849, though repeated inquiri have been made for him at the place of his last residen and elsewhere, nothing whatever has been heard from hi

It is conceded that the evidence brings the case within tl operation of the statute (*Nix. Dig.* 211, § 4,) and that at tl end of seven years from the time the legatee was last hea from, there arises a legal presumption of his death. But is urged, that although at the end of seven years the la presumes that the absent party is dead, there is no presum tion *when* he died; that the law was designed to furnish ev dence of the *fact* of the death, but not of the *time* of tl death. This view of the operation of the statute was adopt by the Court of Kings Bench and Exchequer, in *Doe* v. *N pean*, and appears to be the settled doctrine of the Engli courts. *Doe ex dem. Knight* v. *Nepean*, 5 *Barn. & Ad.* 9 *Nepean* v. *Doe ex d. Knight*, 2 *Mees. & W.* 894; *In re. Cre* 19; *Eng. Law and Eq.* 19.

The same view appears also to have been adopted in son of the American decisions. *McCartee* v. *Camel*, 1 *Barb. C R.* 462; *Spencer* v. *Roper*, 13 *Iredell* 333.

In *Doe* v. *Nepean*, the lessor of the plaintiff claimed tl premises by title accruing on the death of Matthew Kin who went to America in 1807, and was never afterwar heard from. The action was brought within twenty yea from the *expiration*, but not within twenty years from t commencement of the seven years absence. There was other evidence to show at what time the party died, and was held that the claim was barred by the statute of limit tions. As against the plaintiff, the absent party was pr sumed to be alive during the whole period of seven yea

but no such presumption was allowed in his favor. The effect was that the statute of limitations operated against the plaintiff within thirteen years after his right of action accrued.

In the present case this view of the statute must give rise to much more serious embarrassment, and will defeat a recovery of the fund by either party from the impossibility of ascertaining when the legatee died. The child of the special legatee, to entitle himself to recover, must show that the legatee survived the testatrix, otherwise the legacy lapsed. The residuary legatee, to establish her claim, must show that the special legatee died in the lifetime of the testatrix, for in that event alone is she entitled to the fund. And no length of time will remove the difficulty, so that the title to the fund must for ever remain unsettled. Similar embarrassments, it is obvious, will be encountered in numerous cases, in which the aid of the statute may be invoked. A construction which leads to such results ought not to be adopted, except for the most cogent reasons. It will greatly impair the beneficent design of the statute, which was, I apprehend, to furnish a legal presumption of the *time* of the death, as well as of the *fact* of the death. And that design it accomplishes by the fairest rules of interpretation.

The legatee is proved to have been living about three years before the death of the testatrix. The legal presumption, independent of the statute, is that life continues until the contrary is shown, or until a different presumption is raised. *Wilson* v. *Hodges*, 2 *East* 313; 1 *Greenleaf's Ev.*, § 41.

In the absence of the statute, the presumption would be that the legatee is still alive. The design of the statute was, by an arbitrary rule, to fix a definite limit to that presumption of the continuance of life by a contrary presumption that life has ceased. But the presumption of life ceases only when it is overcome by the countervailing presumption of death. And the real question is, not whether the statute furnishes any evidence of the precise time of the death, but

whether it furnishes any evidence of the occurrence of death before the end of the seven years. If it does not, the presumption of life continues, by well settled rules of evidence, independent of the statute. The presumption of death which arises upon the expiration of the seven years cannot operate retrospectively.

There is an apparent, though not a real exception to the rule, that the presumption of life continues in the case of an indictment for polygamy where the wife marries during the absence of the husband before the expiration of seven years. But there the presumption of the continuance of life is overcome by the stronger presumption of the innocence of the party accused. *Rex* v. *Twining*, 2 *Barn. & Ald.* 386.

So there may be circumstances which will create a presumption *in fact* of the death of an absent party within seven years. But this in no wise affects the legal presumption created by the statute, and in the absence of such circumstances the presumption of life continues until arrested by the statute.

It is no answer to say that the probabilities are that the death did not occur at the expiration of the seven years, but at some other time within that period. The time of the death, as well as the fact of death, are presumptions not of fact, but of law. The law regards neither as certain. It simply declares that the party shall be presumed to be dead at the expiration of the seven years, whenever his death shall come in question. The language of the statute, as well as that of 6 *Anne, ch.* 18, and of 19 *Charles* 1, *ch.* 2, for which our statute was designed as a substitute, clearly indicates that an arbitrary rule was designed to be established, by which the rights of parties litigant might be determined in the absence of more unequivocal proof, however inconsistent that presumption might be with the actual truth of the case.

This view of the effect of the presumption created by the statute is sustained by the great weight of American authority. *Burr* v. *Sim*, 4 *Wharton* 150; *Bradley* v. *Bradley*, 4 *Wharton* 173; *Whitesides' Appeal*, 23 *Penn. St. R.* 114

Smith v. *Knowlton*, 11 *New Hamp.* 196; *Newman* v. *Jenkins*, 10 *Pick.* 515; *Eagle* v. *Emmet*, 4 *Bradf.* 124. See, also, *Webster* v. *Berchmore*, 13 *Vesey* 363.

It appearing that the special legatee was in life about three years before the death of the testatrix, the presumption is that he continued in life until after the death of the testatrix, and that consequently the legacy did not lapse. More than seven years having elapsed since the legatee was last heard from, the legal presumption created by the statute attaches. The legatee is now presumed to be dead, and the next of kin is entitled to the fund.

The executors will be chargeable with interest only in the event of their having used or made profit out of the fund.

CHARLES R. CARPENTER *vs.* SMITH MUCHMORE.

On a petition by a defendant that a decree of this court, in all respects regular, be opened, and that he be admitted to answer, alleging surprise and merits, it was *held*—

That the general rule is that a decree regularly entered and enrolled cannot be altered except by bill of revivor.

Great liberality has been exercised in the opening and correcting of decrees before enrollment, and even afterwards (where the decree has been taken *pro confesso*), for the purpose of rectifying mistakes apparent upon the face of the proceedings, or where there is a clear case of surprise and merits.

When the only allegation of surprise is that the defendant is unacquainted with proceedings in this court, but in some way got the impression that he would have until the first day of the present term to file his answer, this is not a sufficient case of surprise. It was his duty to inquire as to his rights. If he negligently relied on his mistaken impression, he incurred the hazard of his default in not answering.

The petition, though sworn to, is no evidence of the facts contained in it. Its truth must be established by affidavits and other evidence taken according to the rules and practice of the court.

J. H. Boylan, for petitioner.

Titsworth, for complainant.

THE CHANCELLOR. The defendant, by petition, asks that the decree, entered in this cause on the twenty-third of August last, be opened, and that he be admitted to answer. There is no suggestion that the decree and the proceedings upon which it is founded are not in all respects regular.

The general rule is, that a decree regularly entered and enrolled cannot be altered, except by bill of revivor. 2 *Daniell's Ch. Pr.* 1232, 1235, and cases cited in *note* 4; 1 *Barbour's Ch. Pr.* 366.

Great liberality has been exercised in the opening and correcting of decrees before enrollment, and even afterwards, where the decree has been taken *pro confesso*, for the purpose of rectifying mistakes apparent upon the face of the proceedings, or where there is a clear case of surprise and merits. 2 *Daniell's Ch. Pr.* 1235; 1 *Barbour's Ch. Pr.* 367.

The ground of complaint is that the mortgage was originally given for a larger amount than was actually due, not by mistake but by design. The alleged fact must have been known to the defendant at and before the time when the bill was filed. The subpœna was regularly served, returnable on the 18th of June last; the decree was signed on the 23d of August. The only allegation of surprise is, that "the defendant is entirely unacquainted with proceedings in this court, but in some way got the impression that he would have until the first day of the present term to file his answer." How and when he got that impression is not stated. It certainly was not from the subpœna. That required him to appear on the 18th of June. The time limited by law for answering expired before the 23d of August, when the decree was signed. It was his duty to inquire as to his rights. If he negligently relied upon his mistaken impressions, he incurred the hazard of his default in not answering. Almost every defendant against whom legal proceedings are instituted might interpose the same excuse for his *laches*. It constitutes no surprise, in the legal sense of the term. It is a clear case of neglect on the part of the defendant to file

his answer, according to the requirement of the statute, after he has been regularly subpœnaed.

Nor has the petitioner exercised due diligence in making his application to open the decree. The petitioner alleges that, a short time before the commencement of the present term, he applied to a solicitor to draw his answer, and while the answer was being prepared, learned, for the first time, that the decree had been made. How long before the commencement of the term he employed a solicitor, or learned that the decree was made, is not stated. It may have been a week or a month. No application was made to open the decree until the sixth of November, the day before that upon which the property was advertised to be sold.

Upon the merits of the case, as made by the evidence, the petitioner is not entitled to relief. The only witness in support of the petition is Morehouse. He testifies that the bond and mortgage in question were given at the instance of Johnston, the mortgagee, for a much greater sum than was really due to him, and that there was not due to Johnston, on said bond and mortgage, at the time the same were given, or at any time since, a sum exceeding four hundred dollars. This affidavit was made on the 22d of November, instant. On the 12th of November, only ten days previously, Morehouse was examined under oath, by order of a judge of the Essex Circuit Court, under the act to prevent fraudulent transfers and assignments. He then testified, in answer to a direct inquiry, that he did not know anything about the amount due to Johnston on the mortgage given to him by Muchmore. Whether the first or last affidavit contains the truth, it is impossible to determine. It is obvious that no dependence can be placed upon the testimony of the witness.

The petition of Muchmore, though sworn to, is no evidence of the facts contained in it. Its truth must be established by affidavits and other evidence, taken according to the rules and practice of the court. *Coxe* v. *Halsted*, 1 *Green's Ch. R.* 311; *Crane* v. *Brigham*, 3 *Stockt.* 33.

There is no evidence sufficient to impeach the *bona fides*

of the mortgage or the amount of the indebtedness as established by the decree.

The application must be denied, and the rule to show cause discharged with costs.

WILLIAM WALDRON *vs.* THOMAS W. LETSON.

When a parcel of land is sold under a decree of foreclosure, and is struck off and conveyed to the purchaser under an erroneous impression that the mortgage covers the entire tract, the price for the entire tract being bid and paid, and the purchaser put into possession, and it is afterward discovered that, from a mistake in the description, the mortgage does not cover the entire premises intended to be mortgaged, by reason whereof the legal title fails, the purchaser is entitled to be protected in the peaceable possession of the land purchased.

Had an application been made on behalf of the mortgagee to reform the mortgage prior to the date of foreclosure there could have been no doubt of his equitable title to relief. And if a mistake in a mortgage may be corrected it is just and equitable that the mortgagor should abstain from availing himself of the mistake to the prejudice of the purchaser.

It is not gross carelessness in a purchaser at a sheriff's sale not to know that the description in a sheriff's deed does not include the entire premises which are understood to be offered for sale.

In this case the devisee of the mortgagor was restrained from proceeding by ejectment to recover the possession of that part of the premises accidentally omitted from the mortgage, and was decreed to release the same to the purchaser.

H. V. Speer, for complainant.

R. Adrain, for defendant.

THE CHANCELLOR. In the year 1819, Thomas Letson was seized and possessed of a lot of land and premises, at the corner of Albany and Spring streets, in the city of New Brunswick, known as the tanyard lot. To the entire front of the lot on Albany street, and to about one hundred and nineteen feet of the front on Spring street, he claimed title by two deeds; the first from the trustees of Freeman, dated in 1813, for that part of the premises which composed the

original tanyard lot, and the second from Philip Oakey, dated in 1822. In 1819 the original tanyard lot was enlarged by the addition of thirty feet on Spring street, or Spring alley, taken from the north, or rear end of two lots owned by Letson, fronting south on Church street. In 1828 the tanyard lot was further enlarged, by additions from the north, or rear end of other lots on Church street, owned by Letson. Being thus seized, on the twenty-fifth of January, 1851, Thomas Letson executed to his son, John S. Letson, a mortgage to secure the payment of $6000 "on all that certain lot of land, with the erections thereon," situate on the southerly side of Albany street, describing the land by metes and bounds, included in the two deeds from the trustees of Freeman and from Oakey, but not including the additions subsequently made to the premises from the rear of the Church street lots. On the fourth of February, 1859, upon a bill filed by William Dunham, an assignee of the said mortgage, a decree was made for the foreclosure and sale of said mortgaged premises. On the thirteenth of July, 1859, the premises were sold, by virtue of an execution issued upon the said decree, by the sheriff of Middlesex to William Waldron, who became the purchaser for $5530. On the twenty-seventh of July a deed, in pursuance of the sale, was executed to the purchaser. At the time of the sale, and for many years previous, the additions made from the Church street lots had been enclosed and used with the tanyard lot, as a part of the same premises. They were so at the time of the sale. Thirty feet of the principal building on the premises then stood on the ground taken from the Church street lots not included within the description of the mortgage. The property, when offered for sale under execution, was spoken of by the sheriff as the tanyard property, though no description of it was given by him variant from that contained in the execution. The purchaser took possession of the whole premises enclosed and known as the tanyard lot, and has expended $500 in repairs of the building on the premises. On the thirty-first of May, 1861, Thomas W. Letson, a son

of the mortgagor, who claims title to the premises by devise of his father, commenced an action of ejectment for the recovery of the thirty feet on Spring street upon which the grist mill stands. The bill in this cause was thereupon filed, claiming that the mortgage, execution, and sheriff's sale were intended to cover and convey the entire lot, with the buildings thereon, praying that the sheriff's deed might be reformed and rectified by inserting sixty-three, instead of thirty-three feet, as the length of one of the lines on Spring street, so as to include the premises in dispute, and that the plaintiff in ejectment might be restrained from further prosecuting his action.

It is satisfactorily shown, by the evidence, that the mortgage was originally understood and designed to include the premises in dispute. As early as 1819, the thirty feet on Spring street was added to and made parcel of the tanyard, a bark-shed being erected thereon, and forming the south line of the lot. Since that time it has been used and occupied as a part of the tanyard lot, and lain within the same enclosure. In 1822, Thomas Letson, the mortgagor, sold and conveyed the adjoining lot on Church street up to the bark-shed. The boundaries of the tanyard, so far as the present controversy is concerned, continued unchanged from the year 1819 to the present time. In 1839 the mortgagor, by will of that date, devised the premises to his son, Thomas W. Letson, by the following description: "The tanyard lot and buildings, including all the land on Spring alley to lot of John S. Letson in Albany street." Under this devise the defendant claims title to the premises in dispute, and they are undoubtedly included in the description. On the twelfth of May, 1848, articles of agreement were entered into between Thomas Letson and his son, Thomas W. Letson, by which the premises were leased to the son for a term of years, in and by which instrument it was agreed, among other things, that the lessor, Thomas Letson, should erect a substantial brick building on said lot for manufacturing purposes for the benefit of the lessee. The agreement recites that "Thomas

Letson is seized and possessed of a certain lot and premises, with the buildings thereon, situate at the corner of Spring alley and Albany street, in New Brunswick, and by his said last will and testament hath devised the said lot of land and premises unto the said Thomas W. Letson." A brick building was thereafter erected on the premises, fronting on Spring alley seventy feet, by forty feet in depth. The south end of of the building corresponded with the south line of the tanyard lot, as previously used, so that thirty feet of its length on Spring street stood upon the ground added to the original tanyard from the rear of the Church street lots. The premises were in this situation on the twenty-fifth of January, 1851, when the mortgage in question was given by Thomas Letson to his son, John S. Letson. The mortgagee testifies that the mortgage was understood by him to cover the whole lot, and he believes it was so understood and intended by the mortgagor. The counsel of the mortgagor, by whom the mortgage was drawn, and who also drew the will of the mortgagor and the lease from him to his son Thomas, states that he was instructed by the mortgagor to prepare the mortgage upon the share of his real estate which he had devised to his son, Thomas W. Letson, assigning particularly his reasons for placing the mortgage upon that property, and that the mortgage was intended to embrace this property. The written instruction to counsel, or the statement of the mortgagor's wishes, written two days before the date of the mortgage, is produced, in which the mortgagor states that, as many changes have taken place since his will was executed, he desires some alteration respecting that portion given to Thomas W. Letson; "that he has placed in cash $6000, which he wished to be secured by bond and mortgage in favor of John S. Letson *on the mill and tanyard property.*" The "*mill*" upon which the mortgage was to be given was the brick building, thirty feet of which stands outside of the lot described in the mortgage. The mortgage was given, in part at least, as security for money advanced in the construction of that building; and yet the description of the premises

contained in the mortgage runs nearly through the centre of the building, utterly destroying its value for all the purposes for which it was intended and used, and greatly impairing the security of the mortgage. It is incredible that such should have been the intention either of the mortgagor or mortgagee. By an agreement, entered into on the twenty-second of February, 1851, by the mortgagor with his son, John S. Letson, it is recited that the mortgagor had agreed with his son, Thomas W. Letson, to erect a brick building on the lot at the corner of Spring alley and Albany street, at a cost of $2000; that the building had been erected at the cost of about $4000, and that he had executed a bond and mortgage *on said premises* to secure John S. Letson, &c.

The evidence renders it certain that the mortgage was understood and intended by both parties to cover the premises in dispute. The mistake arose from adhering, in the description, to the boundaries of the property as originally purchased, without adverting to the additions made from time to time to the rear of the lot from portions of other lots owned by the mortgagor. It was understood that the mortgage included the premises in dispute during the life of the mortgagor, after his death, and at the time of the foreclosure and sale by the sheriff. The purchaser entered into possession of the entire premises, as they had been held, used, and occupied by all the parties for over thirty years. Thomas W. Letson, by his answer, admits that at the time of the sale he was not aware that the mortgage did not include all the premises devised to him as they then existed, or that he had any claim to any part thereof by reason of its not being covered by the mortgage, and he excuses himself on this ground for not stating his claim at the time of the sale.

Had an application been made on behalf of the mortgagee to reform the mortgage prior to the decree of foreclosure there could have been no doubt of his equitable title to relief. There is no more familiar or salutary exercise of the power of a court of equity to relieve against mistakes in written instruments than that of correcting mistakes in the descrip-

tion of the boundaries of lands conveyed or mortgaged. It is equally clear that if the purchaser at the sheriff's sale had discovered the mistake before the delivery of the deed and the payment of the purchase money, he would have been relieved from the obligation of his bid on the ground that the bid was made under a mistake.

The real question in the cause is whether the party is entitled to relief in the situation in which he now stands, and if to any, what that relief should be. Can the alleged mistake be rectified?

There is no mistake in the sheriff's deed. There is no variance or discrepancy between the description of the premises in the deed and in the execution. The sheriff has conveyed all that he was commanded or authorized to sell and all that he advertised for sale.

Nor is there any mistake in the proceedings in chancery under which the sale was made. The bill of complaint describes the property as it is described in the mortgage. The execution follows, as it must necessarily do, the description in the bill. The premises conveyed by the sheriff were the same as those described in the bill, execution, and advertisements of sale, and were the only premises of which a sale could have been decreed under the bill filed in the cause. There is, then, no mistake in the proceedings which can be corrected. The mistake exists, not in the proceedings for foreclosure, but in the original mortgage upon which those proceedings are based. The correction, if anywhere, is to be made there where the error originated. But the time has passed for correcting either the mortgage or the proceedings under it. The mortgage has been extinguished, or the rights of the mortgagor under it determined by the decree. The decree has been executed. The rights acquired under it are vested. I am clear that the specific relief prayed for cannot be granted.

Is the complainant without remedy?

The complainant claims to be protected in the possession and enjoyment of the premises for which he bid at the sheriff's

sale and for which he paid the purchase money. They ar the same premises which it was understood and believed, b persons present at the sale, were being sold. They are th same premises which the mortgagor agreed to mortgage, an which the mortgagee accepted as security for the mortgag debt. The mortgagee has received the price of the who lot in satisfaction of the mortgage debt. The mortgag has been relieved of his indebtedness to the extent of th price of the whole lot. The parties now stand, in the fu enjoyment of all their rights, precisely as they would hav done had the mortgage been drawn, and the sale and convey ance made according to the intention and understanding o the parties. The complainant would seem to present a ver strong claim to be protected in the quiet enjoyment of th premises, as against the mortgagor and his devisee. Havin had the price of the entire lot applied to the extinguishmer of the mortgage debt, he can have no equitable title, a against the purchaser, to any portion of the lot.

I proceed upon the assumption, which is fully justified b the evidence, that it was understood not only by the pur chaser, but by the bidders and persons generally at the sal that the entire lot was being sold, and that the price for whic it was struck off was the price for which the entire lot woul have sold. If it were otherwise the rights of the mortgage would have been prejudiced, and he, and not the purchase would have been entitled to equitable relief.

It was suggested, upon the argument, that the whole diff culty originated in the neglect of the purchaser in not exam ining the description in the sheriff's advertisements, and tha a party will not be relieved against the consequences of h own gross carelessness. But is it gross carelessness in th purchaser at a sheriff's sale not to know that the descriptio in the sheriff's deed does not include the entire premise which are understood to be offered for sale?

Undoubtedly the purchaser is bound to use reasonab diligence in ascertaining what the property is for which he bidding at a public sale. But suppose he examines the d

scription in the advertisement, how shall he know, except by an actual survey, that the description does embrace the entire premises which are offered for sale? He may ascertain whether the description corresponds with the description in the execution; but how shall he know whether the execution follows the mortgage, or whether there are misdescriptions in the mortgage, or whether it covers the entire premises designed to be mortgaged?

Under a sale by execution at common law of a house and lot or of a farm, how is the purchaser to ascertain whether the description in the sheriff's deed includes the whole premises? In the present case it is obvious that the discrepancy between the description in the advertisement, and the visible boundaries of the lot, as offered for sale, could only have been ascertained by actual measurement.

The objections to granting relief to the purchaser are entirely of a technical character. The question arises between the devisee of the mortgagor and the purchaser under the sheriff's sale. There are no intervening equities to be affected by the decree. The mortgagee is a party to the bill, and admits the complainant's equity. The rights of persons interested, if there be such who are not parties to the bill, cannot be prejudiced by the decree. There is no necessity for an amendment either in the mortgage or the sheriff's deed. The ground of relief is, that it is equitable that the complainant should be quieted in the enjoyment of the premises in dispute. All that is required is that the defendant, the devisee of the mortgagor, should be restrained from proceeding at law, and should be decreed to release his title in the premises to the complainant.

The form of relief was administered by Chancellor Kent, in the case of a sheriff's sale under an execution at common law, where a mistake, as to the extent of the premises, was made in the sheriff's deed, under circumstances very similar to those which exist in the present case. *De Riemer* v. *Cantillon*, 4 *Johns. Ch. R.* 85.

There is, it must be admitted, this distinction between the

cases. In that case the mistake existed only in the sheriff's deed. The sale was made in pursuance of power vested in the sheriff, and in accordance with the terms of his advertisement. Here the mistake originated in the mortgage. There was no mistake in the sheriff's deed. And the complainant is asking to be protected in the enjoyment of property for which the sheriff neither did nor could convey a legal title. But that circumstance, while it increases the apparent difficulty of administering relief, does not affect the substantial equity of the case.

There is in this case a further ground of equity, *viz.* that the defendant stood by and permitted the property to be sold, and the purchaser to make improvements on the premises, without making known his title. But I am not disposed to rest the case at all upon that ground. I rest it upon the broad principle, that where a parcel of land is sold under a decree of foreclosure, and is struck off and conveyed to the purchaser under an erroneous impression that the mortgage covers the entire tract, the price as for the entire tract being bid and paid, and the purchaser put into possession, and it is afterward discovered that, from a mistake in the description, the mortgage does not cover the entire premises intended to be mortgaged, by reason whereof the legal title fails, the purchaser is entitled to be protected in the peaceable possession of the land purchased. If the mistake in a mortgage may be corrected, it is just and equitable that the mortgagor should abstain from availing himself of the mistake to the prejudice of the purchaser.

I think the defendant should be perpetually enjoined from proceeding at law, and be decreed to release his right and title in the premises to the complainant; the form of release, if counsel cannot agree in regard to its terms, to be approved by one of the special masters of the court.

The decree to be made without costs to either party, as against the other.

Asa Whitehead's Executors *vs.* The First Methodist Protestant Church of Newark and others.

In a bill for the foreclosure of a mortgage, in which a question arose between the complainants, whose mortgage was given before the erection of a building on the land, and certain lienholders, who had liens for the erection of the building, as to the proportions in which they were respectively entitled to share in the proceeds of sale which were insufficient to satisfy all the claims, it was *held* that the only safe mode of determining the relative claims of the respective parties will be for the master to ascertain the fair market value of the lot and building, and also of the value of the lot, as it stood at the time of the mortgage, clear of the building, both valuations having relation, as near as may be, to the time of sale.

The mode of estimating the relative values of the land and building in *Whitenack* v. *Noe*, 3 *Stockton* 330, and in *Newark Lime and Cement Co.* v. *Morrison*, 2 *Beasley* 136, criticised and disapproved.

Zabriskie, for complainants.

Keasbey, for the lienholders.

The Chancellor. The bill is filed to foreclose a mortgage, given by the First Methodist Protestant Church of Newark to the complainants' testator, upon a lot of land fronting seventy feet on the south side of Hill street, in the city of Newark, to secure the payment of six thousand dollars.

The mortgage bears date on the twentieth day of July, 1859, and was given to secure the purchase money of said lot in one year from date with interest. The mortgagors covenanted to keep the building to be erected upon the premises insured against loss by fire in at least the sum of $4000, and to assign the policy of insurance to the mortgagee as collateral security for the payment of the debt. The mortgage was recorded on the twenty-seventh of July, 1859. After the date of the complainants' mortgage the mortgagors erected a church edifice upon the lot. Ezra Reeve, one of the defendants, filed a lien upon the building and lot for carpenter work

and materials, upon which, on the twelfth of April, 1862, he recovered judgment to the amount of $4845.84 besides costs. Jonas C. Reeve, another of the defendants, filed a lien for mason work and materials, upon which, on the twelfth of April, 1862, he recovered judgment for $2508.95 besides costs.

There is no question as to the validity and order of priority of the respective encumbrances.

It is admitted that the mortgage was given and recorded before the commencement of the building; that the mortgage is the prior encumbrance on the land, and the liens the prior encumbrance on the building.

The only question is, how is the relative value of the building and the land to be ascertained.

The complainants insist that the master shall ascertain the present value of the lot, were there no building upon it, not at a forced or public sale, but at its fair market value, to a person able and willing to hold it till he can realize its true value, and that the sum so ascertained shall be first paid to the mortgagee out of the proceeds of the sale.

The defendants insist that the true mode is to ascertain, as near as may be, the price which the building alone, and the building and the lot together, will respectively bring at sheriff's sale, and the relative value of the two will fix the proportion of the proceeds of the sale to which the parties are respectively entitled.

It is clear that the value of the building and lot should be ascertained by the same standard, and that value should have relation, as near as may be, to the time of the sale.

The true measure of equity unquestionably would be to give to the mortgagee the value of the lot clear of the encumbrance of the building, and to the lienholder the enhanced value which his labor and materials have given to the lot. The mortgagee cannot in equity claim that he shall be benefited by the work and labor of the mechanic or materialman, but he has a strong claim in justice and equity to insist that he shall not be injured by the operation of their claims. On the other hand, the materialman has a right to insist that the loss

incurred by the mortgagee by a forced sale, or by a depreciation in value of property at the time of the sale, shall not be thrown upon him. Each claimant should bear his proportionate share of loss resulting from a sale below the real value of the property. That is a loss to which every mortgagee is exposed, and which is in no wise affected by the building. It is a loss in which both parties necessarily share in proportion to the amount of their respective claims. These positions seem to be self-evident truths. The object of the court has been in all cases to reach this result, though I think it clear that in several cases erroneous methods of attaining it have been adopted. Thus in *Whitenack* v. *Noe*, 3 *Stockt.* 330, the Chancellor thought it would be just for the master to ascertain the original cost of the improvements by means of the bill of particulars furnished with the records of the liens, and then make a proper deduction for depreciation to the time of sale. And in *The Newark Lime and Cement Co.* v. *Morrison*, 2 *Beasley* 136, the value was authorized to be ascertained in the same mode or in such other mode as the parties might agree upon. Now it is obvious that although a reference to the actual cost of the labor and materials may be used as an aid in estimating the value, it can rarely serve as a standard by which to ascertain the real addition which the building has made to the market value of the property. The building may be so injudiciously located, or defectively constructed, or so unfit for the purpose for which it was designed, as to add comparatively but little to the real value of the land or to the price which it will command in the market. The real value of a building may bear no relation to its actual cost. To adopt this estimate of value necessarily subjects the mortgagee to the hazards of all the consequences resulting from the want of judgment of the owner and the ignorance and dishonesty of the mechanics and materialmen.

By this process the security of the mortgagee may be greatly deteriorated. Thus, supposing this church to have cost $18,000, the original cost of the lot being $6000; now if the value of the lot and building together is but $12,000, sup-

posing real estate to have undergone no change in value, and the lot to be still worth, independent of the building, $6000 the mortgagee will have lost just half of his debt, while the complainants will be paid the principal of their liens nearly in full. If the diminution in the value of the security results from depreciation of value or a forced sale it may justly fall on the mortgagee, but if, from an injudicious investment in the building, the mortgagee should not be prejudiced by it. In the latter event the true course would be to deduct the full amount of the mortgage debt from the price, and pay the balance to the lienholders.

The only safe mode of determining the relative claims of the respective parties will be for the master to ascertain the fair market value of the lot and building and also the value of the lot clear of the building, and improvement upon it, as it stood at the time of the mortgage. This will establish the proportions of the claims of the respective parties upon the proceeds of this sale.

It will be decreed accordingly.

Rebecca Cummins *vs.* George Cummins.

It is a well settled rule of this court that in questions of divorce guilt cannot be established by the unsupported testimony of either of the parties.

Although delay in bringing a suit for divorce, after the discovery of the commission of the offence which is the ground of the divorce, of itself constitutes no bar, yet it is a circumstance always open to observation and may, and in many cases ought to determine the court against granting relief.

There is, however, a difference in the application of the principle as against the husband or the wife, as against the latter the delay will rarely furnish evidence of condonation or connivance.

It is in accordance with the soundest principles of public policy and of morality that a wife, while living in a state of separation from her husband in silent submission to her wrongs, shall not be debarred by any lapse of time from the protection to which she might otherwise be entitled whenever the husband shall disturb her peace by an attempted exercise of his marital rights.

J. M. Robeson, for complainant.

J. Wilson, for defendant.

THE CHANCELLOR. The complainant seeks a divorce upon the ground of adultery committed by her husband. The defendant, by his answer, denies the allegations of the bill, and also sets up the adultery of the wife as a bar to the suit. The parties were married in 1826. They lived together until March, 1854, when they separated, the wife having previously withdrawn herself from all cohabitation with the husband. This fact is established by the evidence of both parties. Since the separation the parties have continued to live separate and apart from each other, the wife remaining upon the farm which was given to her by her father, and the husband residing in the immediate neighborhood with the woman with whom he is charged to have committed adultery previous to the separation of the parties.

The charge of adultery against the husband is satisfactorily established by the evidence. The charge is sustained not only by direct proof of the commission of the offence, and by the husband's admission of his guilt, but by a chain of circumstances which in themselves afford satisfactory evidence of the truth of the charge, and constitute sufficient ground for a decree.

The only question in the case arises upon the recriminatory charge made by the defendant's answer against the wife in bar of her suit.

The answer alleges that the wife committed adultery with divers persons unknown to the defendant on different days, through a course of years, extending from 1853 to 1860 inclusive. There is no evidence whatever tending to criminate the wife after the parties separated in March, 1854. The evidence is confined to two acts of adultery alleged to have been committed, the one in the summer, the other in the fall or winter previous to the separation. The proof of the first charge rests upon the direct testimony of a single witness

whose character for truth and veracity is seriously impeache
The circumstances relied on by way of corroboration are
the lightest character, and are susceptible of a natural int
pretation entirely consistent with the complainant's innocen

The second charge is proved by the direct testimony of t
husband, and is attempted to be corroborated by the testimo
of the same witness who was relied upon to support the fi
charge, and whose character for truth and veracity, as w
as that of the husband himself, is impeached. But admitti
the testimony of both the witnesses to be unimpeached, t
charge of the answer is not satisfactorily established.

The direct testimony of the husband is, that on the nig
when the offence is alleged to have been committed he sle
in his own room, on the lower floor of the house, with
acquaintance who was spending the night at his house, t
wife, as was customary, occupying a room in the upper sto
with some of her daughters; that after midnight the h
band left the house, at the request of his guest, to harness
horse; that returning speedily to the house, he saw throu
the window, by the light of a fire burning in the room,
wife in the bed which he had just left with his guest.
his entering the house he encountered his wife hasteni
from the room of his guest, and going to her own room
stairs. The statement of the corroborating witness is, tl
he heard the husband enter the house, heard the steps
some one coming rapidly up stairs, and heard the husba
loudly accusing the wife of her infidelity. The mater
charge rests solely upon the evidence of the husband.
one but he pretends to have seen the wife out of her o
room, much less in the room or bed of the husband's gue
that night but the husband himself. There is no evide
to show any previous intimacy or familiarity between t
wife and the person with whom her crime is alleged to ha
been committed. He is not shown to have visited her at h
home, or to have met her elsewhere. On the day in questi
he came to the house, not to visit the wife, but was broug
there by the husband. He was a boon companion of t

husband. They were both men of intemperate habits. So far as appears they spent the evening together in the husband's room. It is clearly shown that they were drinking until the guest lay upon the floor in a state of gross intoxication, when he was removed from the floor to the bed by the husband, assisted by one of the witnesses. There is no evidence that during the evening the wife either saw or spoke to him. Under such circumstances, that the wife should have left her own apartment, and gone to the room and bed of her husband, then occupied by his intoxicated companion, in the temporary absence of the husband, where she was exposed to observation, is sufficiently improbable. But the further statement of the husband, that after the discovery of his wife's infidelity, he spent some time in conversation with his guest, whom he had just detected in the act of criminal intercourse with his wife, accompanied him to the stable, assisted him in harnessing his horse, and parted with him, so far as appears, with cordiality and without an allusion to the transaction of which he now complains, renders the whole narrative in the highest degree unnatural and improbable.

There is another fact which goes far to discredit the narrative of the husband. In his answer to the complainant's bill he sets up, as he was bound to do, the wife's infidelity in bar of her action. If he then knew when, where, and with whom his wife had committed adultery he was bound to have stated it in his answer. He escapes the well known requirement of the rule of pleading by the general averment that she had committed adultery on different days with divers persons *unknown to the defendant.* That statement, though not sworn to, must be presumed to have been made upon information furnished by the defendant himself. Had the fact, as sworn to by the defendant, been communicated to counsel it would have been embodied in the answer. It certainly could not have escaped the recollection of the defendant. All the corroborating circumstances detailed by the other witnesses were fully within his knowledge when the answer was put in.

We have the husband's authority for saying that he entertained suspicions of his wife, and it seems far more reasonable under the circumstances, to regard the whole scene detailed by the husband as produced by the delirium of intoxication or by the madness of jealousy than to receive it as competent evidence of the guilt of the wife. I have deemed it due to the parties to express my views upon the weight of the evidence inculpating the wife, as it affects not herself alone, but a numerous family of children.

If, however, the evidence of the husband had been much stronger and more satisfactory than it is the decision of the case must have been against the defendant. It is a well settled rule of the court, that in questions of divorce guilt cannot be established by the unsupported testimony of either of the parties.

There is another ground of objection to the divorce which although not urged upon the argument, is entitled to consideration, *viz.* the length of time which has elapsed since the commission of the offence complained of. As has been stated, the parties separated in March, 1854. The acts of adultery on which the bill is founded were committed and known to the wife prior to that time. Nine years at least must have elapsed between the time that the wife was apprised of her husband's infidelity and the filing of the bill. We have in this state no statute of limitations applicable to suits for divorce, nor has this court adopted any analogous rule in regard to them. Delay of itself, therefore, constitutes no bar, and yet it is a circumstance always open to observation, and which may, and in many cases ought to determine the court against granting relief. "The first thing," said Lord Stowell "which the court looks to, when a charge of adultery is preferred, is the date of the charge relatively to the date of the criminal fact charged and known by the party, because if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer

either an insincerity in the complaint or an acquiescence in the injury, whether real or supposed, or a condonation of it." *Mortimer* v. *Mortimer*, 2 *Hagg. Cons. R.* 310.

In *Williamson* v. *Williamson*, 1 *Johns. Chan. R.* 488, Chancellor Kent refused a divorce after the lapse of twenty years, though the adultery was fully proved and the counsel of both parties requested that the divorce should be granted.

There is, however, in this respect a difference in the application of the principle as against the husband or the wife. As against the latter, the delay will rarely furnish evidence of condonation or connivance. A delay in bringing the suit may moreover be not only excusable but meritorious, in the hope of reconciliation, or from natural aversion to giving publicity to domestic difficulties, or involving children in the reproach of a parent's guilt. *D'Aguilar* v. *D'Aguilar*, 1 *Hagg.* 773; *Ferrers* v. *Ferrers*, 1 *Hagg. Cons. R.* 130.

In *D'Aguilar* v. *D'Aguilar*, Lord Stowell said, "it has never been held that a woman's not coming raises even a *presumption* against the truth of such an occurrence; there may be many reasons against such a course, and here the conduct of this lady is accounted for by the voluntary separation being acquiesced in."

In the case before the court, the voluntary separation of the parties has been acquiesced in by the husband. There is no pretence of condonation or collusion. The case falls clearly within the principle of the adjudicated cases. It is moreover in entire accordance with the soundest principles of public policy and of morality, that a wife, while living in a state of separation from her husband in silent submission to her wrongs, shall not be debarred by any lapse of time from the protection to which she might otherwise be entitled, whenever the husband shall disturb her peace by an attempted exercise of his marital rights.

The complainant is entitled to a decree.

LYDIA EMERY, wife of Nicholas Emery, by her next frien
vs. ANDREW VANSICKEL and others.

A married woman, owning real estate by devise from her father, obtain an injunction against a purchaser of the real estate under executi against her husband, restraining him from proceeding with a suit at l to recover the possession of the property. On a motion to dissolve t injunction, it was *held*, that as the wife's claim to protection was found on her allegation, that by her father's will the real estate was devised her sole and separate use, and that her husband had no estate in the la which could be the subject of a levy and sale at law; if that be so t wife has a valid and complete defence at law, and there is no need of t intervention of this court to protect her interest.

The claim of the wife, that if the purchaser under the executions be p mitted to proceed with his suit, it would result in defeating the intenti of testator as to his widow, by depriving her of the home which by t will he directed she should enjoy with his daughter on the premises question cannot avail her in this suit. So far as these considerations tablish any legal right in the widow, they are available only in her l half and at her instance. The complainant cannot by her bill enfo the legal or equitable rights of another.

An injunction having been granted on filing the bill, t defendant answered the bill, and now moves to dissolve t injunction.

Van Fleet, for the motion.

Allen and *Vansyckle*, contra.

THE CHANCELLOR. The bill is filed on behalf of the w of Nicholas Emery, to protect her interest in certain r estate devised to her by her father, George Apgar, deceas against the claim of a purchaser of the real estate under ecutions against her husband. The testator died on t twenty-ninth of July, 1846, seized of the land so devised the complainant, and of which, as the bill alleges, she is n in possession. The bill charges that judgments at law h been recovered against the said Nicholas Emery, and exe tions issued thereon, and that by virtue thereof the rig

title, interest, and estate of the said Nicholas Emery in the lands devised to the complainant were levied upon, sold, and conveyed to Andrew Vansickel, the defendant, by deed dated on the 16th of June, 1862, and that an action of ejectment has been commenced in the Supreme Court against the said Nicholas Emery for the recovery of the possession of the said premises. The prayer of the bill is, that the plaintiff in ejectment be enjoined against proceeding further in his action for the recovery of the said premises, and from instituting any new action for that purpose.

The first ground upon which the injunction is sought to be sustained is, that by the terms of the devise and the true construction of the will of the said George Apgar, the land was devised to the complainant for her sole and separate use, and that the husband has no interest or estate therein which can be the subject of levy and sale at law, or by virtue of which she can be disturbed in the possession and enjoyment of her estate. If this be so, it is obvious that the complainant has a valid and complete defence at law where the action is now depending. It appears, by the answer, that she has been admitted as a defendant to defend the action of ejectment in her own name. The defence, therefore, upon this ground is as available at law as in equity. It appears to me that if the fifth clause of the will be available for the protection of the rights of the wife at the present stage of the controversy, it must be on the ground that it manifests an intent, on the part of the testator that she should take the land for her sole and separate use, and that the husband has no estate therein. If the clause be susceptible of any other construction in favor of the complainant, I think it affords no ground for interfering with the investigation and determination on the legal rights of the parties in a court of law.

The second ground for the continuance of the injunction is, that the intention of the testator in regard to the provisions made for his widow, the mother of the complainant, cannot be carried into effect if the complainant is removed from the premises. The bill alleges that the widow is aged

and infirm, and requires the care and protection of the complainant; that it was the design of the testator not only to provide for his widow a home upon the farm, but to secure to her, *at that home*, the care and attention which a daughter only would bestow; and that the widow has a right to have her board and to receive this care upon the farm and from the complainant, and not elsewhere or at the hands of strangers. So far as these considerations may serve to establish any legal right in the widow, they are available only in her behalf and at her instance. The complainant cannot by her bill enforce the legal or equitable rights of another. They can strengthen the case of the complainant only so far as they may serve to indicate the intention of the testator as to the character of the estate which his daughter should take in the land devised. In this view it involves simply a question of legal title. It raises no equity in favor of the daughter.

The injunction was granted under an apprehension that the terms of the will, which are peculiar and to some extent conflicting, created a trust in favor of the complainant aside from the legal estate devised, which it was the peculiar province and duty of this court to protect, and in regard to which the rights of the complainant might be prejudiced by a recovery at law. I think this was a misapprehension of the case. There can be no advantage derived from holding the case till a final hearing.

The injunction must be dissolved and the bill dismissed.

Sarah Kirrigan *vs.* William Kirrigan.

In a suit for divorce, instituted by the wife, where it appears that the parties have already been divorced by a decree of a court of Indiana, in a proceeding instituted by the husband, the wife has no title to the aid of this court.

When it appears, by the record of the proceedings in Indiana, that the court had jurisdiction both of the parties and of the subject matter, that the defendant appeared by counsel, and has received from the clerk of that court the sum awarded her in that suit for alimony, she will not now

be permitted to impugn the decree on the ground that it was fraudulently obtained.

When it appears, to the satisfaction of the court, that the proceedings have not been instituted by the wife in good faith for the purpose of obtaining a divorce, but for the mere purpose of collecting money from her husband, or compelling him to support her, alimony will be denied, and a writ of *ne exeat* previously issued will be granted.

This case came before the court on a motion in behalf of the petitioner for alimony and counsel fees, and a cross-motion by defendant to vacate a writ of *ne exeat* previously issued, and discharge him from arrest.

Slaight, for petitioner, cited *Bishop on Marriage and Divorce*, § 709, 714, 756, 736 *c*; *Revised Statutes of Indiana*, 234, § 7.

Zabriskie, for defendant, cited *Story on Conflict of Laws*, § 230; *Bishop on Marriage and Divorce*, § 720, 732; *Bradshaw* v. *Heath*, 13 *Wendell* 407.

THE CHANCELLOR. The petitioner in this cause seeks a divorce from her husband on the ground of adultery. Upon filing the petition, accompanied by an affidavit of the wife that the defendant designed quickly to depart from the state, and that she believed him to be worth at least thirty thousand dollars, a writ of *ne exeat* issued, with an order endorsed requiring bond to be given in the sum of five thousand dollars. The case now comes before the court upon a petition of the complainant for an allowance of alimony *pendente lite* and counsel fees, and upon a cross-motion on the part of the defendant to be discharged from arrest under the writ of *ne exeat*. At the close of the argument the case disclosed by the evidence appeared so strong against the right of the petitioner to redress that the defendant was immediately discharged. On a further consideration of the case, I am entirely satisfied not only that the decision then made was correct, but that the application for alimony and counsel fees must be denied.

The material facts of the case, as they are disclosed by the petition or established by the evidence, are that the parties were married in the year 1842, in the city of Philadelphia, where they then resided, and where they continued to reside together as man and wife until the year 1854, when, as the petitioner alleges, the husband eloped in company with another woman, with whom he lived in adultery. Proceedings were instituted by the wife in the state of Pennsylvania for a divorce, and on the fourteenth of September, 1854, a decree was made by the court that the husband should pay for the support of his wife six dollars a week. On the thirtieth of January, 1855, the wife obtained an order for an additional allowance of six dollars per week, making, with the former allowance, the sum of twelve dollars per week for the support of herself and her family. The allowance remains unpaid, except the sum of eight hundred dollars, the amount of security required and given for the performance of the order. So far as appears, the orders for maintenance are still in force, and the proceedings for divorce pending and undetermined. From 1854 until 1859, it is alleged that the husband resided principally in the state of New York. On the twenty-third of February, 1859, he obtained, in the Circuit Court of the county of Whitley, in the state of Indiana, a decree of divorce against his wife from the bond of matrimony. In 1861, the complainant instituted a suit against the defendant, in the state of New York, for her maintenance and support, which was dismissed on the ground, as she believes, that the husband was not a resident of that state. The defendant is now transacting, with limited means, a small business in the city of New York, having his home in this state. The complainant, since her desertion by her husband, has resided in the state of Pennsylvania, where she still continues to reside. The adultery complained of is alleged to have been committed in this state within the last eighteen months.

I think it is apparent, from the evidence, that these proceedings were not instituted by the complainant in good faith for the purpose of obtaining a divorce, but for the mere pur-

pose of recovering money from the defendant, or of compelling him to support her. The parties are already divorced by the decree of a judicial tribunal, obtained by the husband in the state of Indiana. Proceedings for a divorce were long since instituted by the wife in the state of Pennsylvania, the place of the parties' domicil, where, if the allegations of the petitioner are true, a decree of divorce has been or may be obtained against the defendant. In 1861 proceedings against the defendant were instituted by the complainant, in the state of New York, for her support and maintenance. On filing her petition for a divorce in this state, the petitioner sued out a writ of *ne exeat* upon an affidavit that he was worth at least thirty thousand dollars, by virtue of which the defendant was arrested and imprisoned. It appears satisfactorily from the evidence that the value of the defendant's property was grossly overrated, and that he was unable to give bail, even in the sum of five thousand dollars. I cannot but regard the proceedings on the part of the complainant as instituted in bad faith, (without, as I am convinced, any participation on the part of her counsel,) and as a gross abuse of the process of the court. On this ground alone I should unhesitatingly quash the writ of *ne exeat*, and refuse to allow alimony. But aside from this view of the case, the petitioner has no title to the aid of this court; as the facts now appear in evidence, she is not the wife of the defendant. The parties have been divorced by a decree of a judicial tribunal in the state of Indiana. It is urged that that decree was fraudulently obtained, inasmuch as at the time neither of the parties were *bona fide* residents of that state, and that the husband went from the state of his domicil, and took lodgings at a hotel in the state of Indiana, for the mere purpose of obtaining the divorce, and that he returned to the place of his domicil in New York immediately after the decree was obtained. The fact of the fraud is not established. It is declared by the decree, that at the time it was granted the husband was a *bona fide* resident of the county of Whitley, in the state of Indiana. The court, as appears upon the face of the decree,

had jurisdiction of the parties as well as of the subject matter. Both parties were before the court. The defendant appeared by counsel. Five hundred dollars were adjudged to her as alimony by the decree. That sum the wife received from the clerk of the court in full of the alimony awarded by the decree. The wife having appeared to the suit, and having accepted the amount awarded to her by the decree for alimony, will not be permitted to impugn the decree on the ground that it was fraudulently obtained. And even if the decree might be legally assailed upon this ground, it must be presumed to be valid until the fraud is clearly established in evidence.

The motion for alimony and counsel fees is denied.

JESSE W. BENEDICT *vs.* JAMES M. BENEDICT and others.

Complainant and defendant, being both residents of the city of New York, were both creditors of the firm of H. S. & Sons, also doing business in New York. Both had presented their claims, and obtained judgment in an attachment which had been sued out against the firm in this state, and by virtue of which the property of one of the firm, situate in this state, had been attached, but not sufficient in value to satisfy the claims of all the applying creditors under the attachment. The defendant was also a preferred creditor for the amount of his claim under an assignment executed by H. S. & Sons, in the city of New York, by virtue of which the assignee held assets enough to satisfy the claims of the creditors in the same class with the defendant, but not enough to pay the general creditors, of whom the complainant was one. Defendant also held other collateral securities for the payment of the same debt. On a bill filed by the complainant to restrain the defendant from receiving any dividend under the attachment until he had first exhausted his remedy under the assignment, and had resorted to the collateral securities held by him, it was *held*—

That the complainant had no equity to justify this court in arresting the proceedings under the attachment, or in interfering with the mode of distribution pointed out by the statute.

The rule of equity is well settled, that where one has a lien upon two funds, and another a subsequent lien upon one of them only, the former will be compelled first to exhaust the subject of his exclusive lien, and will be

permitted to resort to the other for the deficiency only. But the equity is a personal one against the debtor, and does not bind the paramount creditor nor the debtor's alienee for value.

It is an equity against the debtor himself that the accidental resort of the paramount creditor to the doubly charged estate, and the consequent exhaustion of that security, shall not enable him to get back the second estate discharged of both debts.

The objection to throwing the claim of the defendant upon the assignment for satisfaction is, that it cannot be done without prejudice to the claims of the creditors, who are entitled to share the fund under the assignment.

The statute of this state only prohibits preference of one creditor over another in a general assignment for the benefit of creditors, and not in any other form. Every debtor, by our law, has a right to prefer one creditor over another by mortgage, by judgment, or by any other mode than that which the statute prohibits, and such preferences, especially when made in favor of sureties or confidential creditors, are not regarded with disfavor or treated as inequitable.

As between citizens of New York, where preferences by assignment are allowed by law, no distinction can be made between the equitable character of the claims under the attachment and under the assignment.

On filing the bill in this case a preliminary injunction was allowed under the circumstances, which are stated in the Chancellor's opinion.

Defendant, having answered the bill, now moves to dissolve the injunction.

J. W. Scudder and *Bradley*, for the motion.

Slaight and *Zabriskie*, contra.

THE CHANCELLOR. The complainant and defendant are respectively creditors of the late firm of Horace Southmayd & Sons, merchants of the city of New York. On the first of April, 1861, the complainant caused an attachment to be issued out of the Circuit Court of the county of Hudson against the estate of the partners in said firm, as nonresident debtors. The attachment was served upon the real estate of Horace Southmayd, one of the partners. On the twentieth of April, 1862, judgment in the attachment was rendered in favor of the complainant, Jesse W. Benedict, for $2079.60, in favor of James M. Benedict for $48,407.45,

and in favor of numerous other creditors for various sums, amounting in the whole to $68,491, greatly exceeding in amount the estimated value of the real estate attached. On the twenty-fifth of April, 1861, the firm of Horace Southmayd & Sons made an assignment of all their partnership property, under the laws of the state of New York, for the benefit of their creditors, to Frederick H. Trowbridge, thereby giving preferences to various classes of creditors. James M. Benedict is a preferred creditor under that assignment, and the property assigned will be sufficient to satisfy his claim. The complainant is not a preferred creditor under the assignment. By the terms of the assignment, he is to be paid, in common with the general creditors, after the claims of all the preferred creditors are satisfied. The assets in the hands of the assignee will not be sufficient, after paying the preferred creditors, to satisfy the general creditors. The bill also charges that James M. Benedict is fraudulently confederating with Horace Southmayd & Sons for their benefit, and that he intends to accept payment both under the assignment and under the judgment in attachment. The bill also charges that other collaterals are held by James M. Benedict for the payment of the same debt, and that he is not entitled to come in under the assignment until he has exhausted his remedy upon those securities.

The bill asks that the defendant, James M. Benedict, be restrained from receiving any dividend under the judgment in attachment until the claims of the complainant and of other applying creditors under the attachment are satisfied, and that the assets of the firm be marshalled, and applied in satisfaction of the debts upon equitable principles.

The fact that the property attached is the individual property of one of the partners, and not the joint property of the firm, in no wise affects the rights or equities of the parties to this suit. Both the complainant and defendant are creditors of the firm. The separate estate of an individual partner is, by the express terms of the statute, made liable to an attachment for the recovery of a debt due from the partner—

ship, and is liable to be sold or assigned under the attachment for the payment of such joint debt. *Nix. Dig.* 42, § 42.

If any objection was designed to be raised to the form of attachment, this is neither the time nor the forum in which that objection, if it existed, can be made available. Judgment upon the attachment has been rendered, and the property made answerable to the claims of the creditors of the firm.

The only question now open for the determination of this court is, how is the money arising from the sale of the property attached to be distributed? The statute has, with great precision and minuteness, prescribed the time when, the manner in which, and the persons to whom the distribution shall be made. It directs, among other things, that the auditors "shall distribute among the said plaintiffs and creditors, equally and in a ratable proportion, according to the quantum or amount of their respective debts, as ascertained by the said report and the judgment thereon, all the moneys arising from the sale of the said goods and chattels, lands and tenements, first deducting legal costs and charges." *Nix. Dig.* 41, § 36.

Each petitioning creditor under the attachment has a judgment in his favor for his debt, which he is entitled to have satisfied out of the proceeds of the sale, so far as there are assets for that purpose. It is made the duty of the auditors so to distribute the fund. Will a court of equity so far interfere with the legal rights of the creditor as to prevent his receiving satisfaction of an admitted debt out of a fund raised by judicial proceeding ready to be paid over and especially appropriated to the satisfaction of that debt, and turn him round upon a mere question of equity to seek his remedy by legal process upon his collaterals or by proceeding in a foreign jurisdiction? Can this be done without an unwarrantable infringement of his legal rights? Even if this be admissible in the case of a judgment creditor, where the rights of a single creditor are involved, will the court, upon a principle of sound public policy, arrest the proceedings in attachment and the

distribution of the fund among the creditors upon questions of equity arising between individual creditors?

It would seem that the utmost, under such circumstances, the complainant could ask would be to be subrogated to the rights of the defendant, his claim being first satisfied in full. But that relief the complainant does not ask and cannot have. The whole frame of the bill rests upon the assumption that, if James M. Benedict comes in under the attachment, none of the creditors claiming under the attachment can receive their claims in full. Unless his claim is satisfied in full he cannot be asked to surrender his securities, nor can the complainant claim to be subrogated to his legal rights. What the complainant does ask is, that the defendant shall be compelled to apply first the proceeds under the deed of assignment made for the benefit of creditors in New York, and of the several collateral securities in his hands, to the payment of his claim before resorting to the attached property or the funds in the hands of the auditors, and that he shall be permitted to claim from the auditors a dividend only upon such part of his claim as shall not be satisfied by the said securities, or that the said securities shall be marshalled in such manner as to secure to the complainant and the other judgment creditors under the attachment the full benefit and advantage *pro rata* of the said securities.

This end cannot be attained in the mode proposed without driving James M. Benedict to sue upon his collaterals, delaying him in the receipt of his money, compelling him to incur the hazard, expense, and delay of litigation, and at the same time arresting the proceedings in attachment and the distribution of the funds by the auditors for an indefinite and uncertain period, until the suits upon the collaterals and the proceedings under an assignment in a foreign jurisdiction may be eventually settled.

When the injunction was issued I was not without apprehension that this measure would be an unwarrantable interference with the proceedings under the attachment, in conflict with the policy of the law and a violation of the rights of

the other attaching creditors. There are cases, I am aware, that sustain this proceeding, so far as it may affect the rights of James M. Benedict alone, though even upon this point the authorities are in conflict. *Adams' Eq.* 372, *note* 2, and cases there cited; 2 *Leading Cases in Eq.* 276—279.

But I am not aware of any authority which sanctions the extent of power which the court is asked to exercise in this cause, nor do I perceive any principle upon which it can be sustained. But if this objection be unfounded, and the right of the complainant to claim the interference of the court for the protection of his rights be clear, has he any equity which entitles him to the relief asked for?

The first ground of relief is, that the defendant is a preferred creditor under the assignment in New York, and that his claim is secured upon that fund. The rule of equity is well settled, that where one has a lien upon two funds, and another a subsequent lien upon one of them only, the former will be compelled first to exhaust the subject of his exclusive lien, and will be permitted to resort to the other for the deficiency only. But the equity is a personal one against the debtor, and does not bind the paramount creditor nor the debtor's alienee for value.

It is an equity against the debtor himself, that the accidental resort of the paramount creditor to the doubly charged estate, and the consequent exhaustion of that security, shall not enable him to get back the second estate discharged of both debts. *Adams' Eq.* (*ed.* 1859) 585.

But it is clear that the debtor in this case cannot get back the estate held under the assignment discharged of either debt. That estate in the hands of the assignee, after the satisfaction of the claim of James M. Benedict, is charged with all the debts of the firm of Southmayd & Sons, including the debt of the complainant himself. The debtors cannot get back the estate, nor derive any benefit from the fund assigned, until all their debts are paid in full. This difficulty appears to have presented itself to the mind of the draftsman of the bill, and, as if to avoid it, he charges a fraudulent combina-

tion between Benedict and the debtors, in pursuance of whi the former is to receive the benefit of both funds, and tu them over to the debtors. But the court will not presu a gross breach of duty by the assignee in New York. Ber dict clearly cannot be paid twice. If he receives his sha of the fund under the attachment in part payment of l claim, it will diminish by so much his claim to a divide under the assignment. It must be presumed that the cou of New York, to whose jurisdiction and control the assign is subject, will compel the performance of his duty, or h(him responsible for its breach. The equity, therefore, whi is asked to be enforced against the debtors, if enforced in t manner proposed, will affect not the debtors but their alien(for value. It will affect the general creditors of Southma & Sons under the assignment, creditors in equal degree wi the complainant, and for whose benefit the fund was assign(*Adams' Eq.* 272, and cases cited in note; 2 *Leading Cases Eq.* 221; *McGinnis' Appeal*, 16 *Penn. St. R.* 445.

In considering this question, it must be assumed that t assignment made by the debtors for the benefit of their c(ditors in the state of New York is a valid and legal assig ment under the laws of that state, and that all its provisic are in accordance with the recognized principles of law a equity which there prevail. The debtors had a right, by th(assignment, to make preferences among their creditors, prescribe the order of priority in which the creditors shou be paid, and the amounts they should respectively recei\ These provisions the trustee is bound to carry into effe(The terms of the assignment are the law of the trust, whi the trustee must respect. They regulate the rights of t several classes of creditors under the assignmeut. The preferences are for the purposes of this case not to be regar ed as inequitable. Our statute has indeed prohibited all pr ferences of one creditor over another in a general assignme for the benefit of creditors. But it does not prohibit it any other form. Every debtor, by our law, has a right l the transfer of property by mortgage, by judgment, or in a

ther form, except by general assignment for the benefit of reditors, to prefer one creditor over another; and these pre-erences, especially when made in favor of confidential cre-itors or mere sureties, are not regarded with disfavor or reated as inequitable. No distinction, therefore, can be made etween the equitable character of the claims under the at-achment and under the assignment, especially as between itizens of the state of New York, where the assignment is nade.

The decided objection to throwing the claim of the de-endant upon the assignment for satisfaction is, that it cannot e done without prejudice to the claims of the creditors who re entitled to share the fund under the assignment.

It will operate to the prejudice either of the creditors in he same class with the defendant, or, if there be funds suffi-ient to satisfy those claims in full, it will operate to the prejudice of the general creditors, who are in the next class, nd are not preferred. They have equal equities and an equal claim to protection with the creditors under the attachment, and I perceive no ground upon which the claim of the de-fendant can be thrown exclusively upon that fund to their prejudice. All that the complainant can ask is that the de-fendant shall not receive his pay twice, or use it for the benefit of the debtors. That result is secured by the terms of the assignment. The creditors entitled under it can receive a lividend only upon what may remain due after deducting rom their respective claims the amount received upon their ollateral securities.

If the complainant was a citizen of this state, complaining f the effect of the assignment in a foreign jurisdiction, al-eging that it operated in evasion of our statute, and to the rejudice of his interest, and claiming to have the funds ad-ministered in this state for his benefit, a different case would e presented for consideration. But it is unnecessary to con-sider the case in this aspect. The complainant and defend-nt are both citizens of New York. Neither can complain hat the funds are removed to the jurisdiction of the state in

which they are both domiciled, or that the adjudication of their rights are left to the judicial tribunals of that state.

If there be any equity whatever in this bill, it must rest upon the charge of actual fraud. That charge is fully denied by the answer.

The injunction is dissolved with costs.

CORNELIUS BENSON *vs.* DENNIS WOOLVERTON and others.

Where a bill filed to avoid a deed, on the ground that it was never delivered to the grantee, but was fraudulently and clandestinely taken from his possession, and the defendants (the heirs of the grantee) have no personal knowledge of the delivery of the deed, and can only answer as to their information and belief, and the answer contains no positive denial of the fact which is distinctly alleged and charged in the bill, and therefore not evidence in the defendant's favor upon that point, the complainant is not required to increase the weight of his evidence to overcome the answer.

The fact of the possession of a deed by the grantee, duly executed and acknowledged by the grantor, is presumptive evidence of the delivery of the deed at the date of the acknowledgment. That presumption is to be overcome by counter evidence of superior weight. The uncorroborated evidence of the grantor is not sufficient for that purpose.

J. W. Taylor, for complainant.

Titsworth, for defendant.

THE CHANCELLOR. The bill is filed to avoid a deed, executed by the complainant to Sarah Blackburn, dated on the seventh, and acknowledged on the eighth of August, 1860. The execution and acknowledgment of the deed are admitted. The sole question in the cause is, whether it was delivered to the grantee. The bill alleges that it was not intended or agreed to be delivered until the death of the grantor; that it was never delivered, but was retained by him until it was clandestinely and fraudulently taken from his possession by the grantee. The deed was in possession of the grantee, and

was sent by her to the office of the register to be recorded on the fifth of April, 1860. The grantee died on the thirtieth of April, 1860. The bill is filed against her heirs.

The defendants have no personal knowledge of the delivery of the deed, and can only answer as to their information and belief. The answer contains no positive denial of the fact, which is distinctly alleged and charged in the bill, that the deed was clandestinely and fraudulently taken from the possession of the complainant. It is not evidence in the defendant's favor upon that point. The complainant is not required to increase the weight of his evidence to overcome the answer. *3 Greenl. Ev.*, § 287.

The case depends solely upon the sufficiency of the evidence to sustain the allegation of the bill. The truth of the charge, that the deed was not delivered, but was fraudulently taken by the grantee from the possession of the complainants, rests exclusively upon the unsupported testimony of the complainant himself. He is not corroborated upon this point by the testimony of a single witness, nor by any decisive or significant fact or circumstance disclosed by the testimony. The question then is distinctly presented, whether a deed duly executed and acknowledged, and in the possession of the grantee in her lifetime, can after the death of the grantee be set aside as invalid upon the uncorroborated testimony of the grantor that it was never delivered. I have no hesitation in saying that it ought not to be done. The statute has made the complainant a competent witness in his own behalf. But he is an interested witness, and his testimony is not entitled to the weight of impartial testimony. The manifest policy of the statute moreover is, that the witness should only be heard or credited where he can be confronted with the testimony of the opposite party. Under the facts of this case, the complainant is not excluded by the terms of the statute from being a witness. There is therefore, it is conceded, some evidence in support of the complainant's case.

But the fact of the possession of a deed by the grantee, duly executed and acknowledged by the grantor, is presump-

tive evidence of the delivery of the deed at the date of the acknowledgment. That presumption is to be overcome by counter evidence of superior weight. The uncorroborated testimony of the grantor is not sufficient for that purpose. Upon a bill filed for the foreclosure of a bond and mortgage, the uncorroborated testimony of the defendant in support of his answer, that the mortgage was never delivered, or that it had been paid and satisfied, will not avail to defeat a recovery. The possession of the mortgage by the mortgagee, duly executed and acknowledged, is presumptive evidence not only that it was duly delivered, but that it remains a valid and subsisting encumbrance. These presumptions cannot be overcome by the unaided testimony of an interested party. There are usually circumstances clustering around a transaction which shed light upon its real character, and which serve as reliable guides to the truth. But after the most careful examination of the evidence in this cause, I find no one material circumstance corroborative of the complainant's evidence upon the material point at issue. If the fact, that the complainant should have agreed to give a title for the house and lot for one year's service of the grantee as housekeeper seems improbable, the agreement which he admits he did make is but little less extraordinary on his part, and more remarkable on the part of the grantee.

If the fact that the deed was not immediately placed upon record be at all significant, it is naturally accounted for; and the evidence shows that it was not sent to be recorded until the grantor proposed, in violation of his admitted contract, to sell the property. If it be true that the complainant, a few hours before the death of the grantee, charged her with having taken the deed improperly from his possession, the evidence shows that she instantly repelled the charge, and claimed that the title was rightfully in herself.

If, therefore, there was no counter testimony whatever on the part of the defendants, I should unhesitatingly declare that the complainant's case is not sustained by the evidence.

But there is positive testimony, of the most decisive cha-

racter, utterly repugnant to the case made by the complainant. The bill alleges, and the complainant testifies that the deed was executed and acknowledged upon an agreement, that if the grantee would continue in his service, and act as his housekeeper during his life, he would support and maintain her, and on his death leave her a deed of conveyance for the land. There is direct proof by a witness, who alleges that he was present at the contract, that the agreement was that the deed should be executed and delivered if the grantee remained in the complainant's employ for one year. It was executed and acknowledged at the expiration of the year, and was soon afterwards seen in the possession of the grantee. There is also direct evidence that the complainant, before the expiration of the year, declared that he intended to deliver the deed immediately, and that after the year expired he repeatedly declared that the deed had been delivered. It is true that these witnesses, with a single exception, are interested in the result of the suit. But the complainant's evidence is open to the same objection. Nor do I perceive that there is a single objection to the credibility of these witnesses which may not be urged with at least equal force against the credibility of the complainant. The case is doubtless characterized by very peculiar features, which affect to some degree the moral status and credibility of the complainant and of some of the witnesses on the part of the defendants, but they cannot affect the result of the case.

The parties are both dead, and nothing can be gained to the cause of truth and justice by the further discussion of the circumstances which have given rise to the controversy.

The injunction must be dissolved and the bill dismissed.

Mary Ann Mount *vs.* Alfred W. Mount.

On a petition for divorce, filed by a wife against her husband, on ground of adultery, when the only proof that of the guilt of the band is, that within six months after his marriage, he was affected venereal disease, the evidence is not of itself sufficient to justify a de

When the facts relied on are susceptible of two or more interpretat any one of which is consistent with the defendant's innocence, they not be sufficient to establish guilt. Though it is not necessary to p the direct fact of adultery, it is necessary to show that adultery is only necessary conclusion from the facts of the case.

When the defendant was examined as a witness, and denied that since marriage he has had connection with any other woman than his w although his evidence is not entitled to the weight due to the testim of a fair and impartial witness, it is nevertheless entitled to some weig and in a case of this kind is at least sufficient to overcome the effec the evidence on the part of the complainant.

The Chancellor. The parties were married on the fi of May, 1861. On the tenth of March, 1862, the wife fi her petition for divorce on the ground of adultery. The a gation of the petition is, that the husband, during the mon of October and November, 1861, and at other times, comm ted adultery with divers females, whose names are unkno to the petitioner. The proof is, that the defendant, ab the month of October, 1861, within six months after his m riage, was affected with the venereal disease. The case re solely upon this evidence. There is no evidence as to previous relations of the parties, or as to the habits, char ter, or conduct of the defendant. The wife testifies that saw nothing to excite her suspicion in regard to his cond about the time of the alleged adultery, nor does she all that she did so at any other time after the marriage. further states that they did not live together at that ti The first suspicion that appears to have been entertained the wife of her husband's criminal conduct resulted from voluntary statement, made by the husband to her mot that he was suffering from the disease. It appears furth from the evidence, that in October, 1861, the wife was ap

rently free from disease. The husband has been examined as a witness, and denies most explicitly that he has been guilty of adultery. I do not think the evidence sufficiently strong to justify a decree for divorce.

The fact that the husband, long after marriage, is infected with the venereal disease, has been held sufficient *prima facie* proof of adultery. *Popkin* v. *Popkin*, 1 *Hagg. Ec. R.* 765, *note to the case of Durant* v. *Durant; Johnson* v. *Johnson*, 14 *Wend.* 637, *North* v. *North*, 5 *Mass.* 320; 2 *Greenl. Ev.* 44.

In the case of *Collett* v. *Collett*, where it was attempted to establish adultery against the husband by showing that the wife was suffering under a recent infection, Dr. Lushington said: "it is impossible to lay down any general inflexible rule, for each case must depend upon its own circumstances, and it is scarcely possible to conceive a case without some circumstances which would assist the court in coming to a conclusion." On the hearing of the same cause by the judicial committee, it was held that the adultery of the husband must not be inferred from the mere fact of the wife's being tainted with the venereal disease, although she herself is not even suspected of adultery, inasmuch as the existence of such a disease in the wife is consistent with the adultery of the husband, with her own adultery, and with accidental communication of it." The converse of the proposition would seem to be equally true, that the existence of the disease in the husband is consistent with the adultery of the husband, with its having been communicated by the wife, and with accidental communication of it. *Bishop on Marriage and Divorce*, § 440.

When the facts relied upon are capable of two or more interpretations, any one of which is consistent with the defendant's innocence, they will not be sufficient to establish guilt. Though it is not necessary to prove the direct fact of adultery, it is necessary to show that adultery is the only necessary conclusion from the facts of the case. *Ferguson* v. *Ferguson*, 3 *Sandf. Sup. Co. R.* 307.

Proceeding, as I do, upon the assumption of the entire innocence of the wife, is the guilt of the husband the necessary conclusion from the facts of the case? The parties had been married less than six months when the disease developed itself. The wife had been previously married. How long she had been a widow does not appear. Is it impossible or highly improbable that the wife may have been infected with the disease during her former marriage, and that the disease was still lurking in her blood? It is proved that the wife voluntarily submitted herself to a medical examination, and the physician testifies that he discovered no traces of the disease. But it is worthy of remark that she submitted herself to the examination under the pretext that she had fallen from a horse, and it was not until afterwards that the physician was informed of the real object of the examination. The investigation does not appear to have been made at all in reference to the existence of the disease in question. Under the circumstances, may not the symptoms of the disease have escaped the attention of the physician, or may they not have been so far suppressed as not to be perceptible? Is the evidence sufficient to prove the nonexistence of the disease so fully as to establish the guilt of the defendant.

As already said, there are no other circumstances in the case to aid the court in arriving at a correct conclusion. No evidence touching the husband's character or habits. It is not proven that the husband kept improper company or visited disreputable places of resort. It is not shown that he ever visited or associated with any other woman than the complainant. The evidence is not in itself sufficient to justify a decree. But admitting that the complainant's evidence is sufficient *prima facie* to raise a presumption of adultery against the husband, the case does not rest upon this evidence alone. The defendant has been examined. He testifies explicitly that since his marriage he has had connection with no other woman than his wife. Without attaching undue importance to the evidence of the defendant, admitting that it is not entitled to the weight due to the testimony of a fair

and impartial witness, it is nevertheless entitled to some weight, especially in connection with his own voluntary statement to the mother of the complainant, that he was infected with the disease. Why should he have made that statement if he was really guilty of adultery? His defending the cause is evidence that it was not made by collusion. The explicit testimony of the defendant is at least sufficient to overcome the effect of evidence on the part of the complainant.

I shall decree for the defendant, but without costs as against the complainant.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE STATE OF NEW JERSEY,

FROM FEBRUARY TERM, 1852, TO OCTOBER TERM, 1858.

BENJAMIN WILLIAMSON, ESQ., ORDINARY.

PETER S. CONOVER, appellant, *vs.* ALFRED WALLING and others, respondents.

A person to whom property is struck off at a sale made by commissioners appointed by the Orphans Court in proceeding for partition acquires a right which the court is bound to protect. Such bidder has a right to have a deed for the property, unless for good cause the sale be set aside. If the court, without good cause, set aside the sale, such bidder is a *party aggrieved* by an order of the Orphans Court, and as such is entitled, by the constitution of this state, to an appeal to the Prerogative Court.

William L. Dayton, for appellant.

P. Vredenburgh, for respondents.

THE ORDINARY. An application having been made to the Orphans Court of the county of Monmouth for a partition of the real estate late of John M. Holmes, deceased, under the act entitled "an act for the more easy partition of lands held by coparceners, joint tenants, and tenants in common," such proceedings were had therein, under and in pursuance

of the said act, that the respondents, who were the comi sioners appointed by the court, were ordered to make sal the said real estate.

The land was sold in two parcels by the commissioners, of which was struck off to Daniel H. Ellis, for the sui $18,375, and the other to Peter S. Conover, the appell for $12,500. The appellant signed the conditions of sale, paid to the commissioners ten per cent., as required.

The commissioners made their report of sales to the phans Court. Objections to confirming the sales were m on behalf of parties interested, and after hearing the ap lant and the parties objecting, and their evidence, proof, allegations, the said Orphans Court, at the term of Dec ber last, did order, adjudge, and decree that so much of report of sales as applied to the part sold to Daniel H. should be confirmed, and that so much thereof as applie the part sold to the appellant should not be confirmed, set aside and for nothing holden.

From this order of the Orphans Court Peter S. Con appealed to this court.

A motion is made to dismiss this appeal, on two groun 1, that the appellant is not a party aggrieved, and there has no right to appeal; 2, that the order is not one f which an appeal can be taken.

The right of appeal from an order or decree of the Orp Court to the Prerogative Court is given by the constitut in these words: "All persons aggrieved by any order, s tence, or decree of the Orphans Court may appeal from same, or from any part thereof, to the Prerogative Cou but such order, sentence, or decree shall not be removed i the Supreme Court or Circuit Court if the subject mat thereof be within the jurisdiction of the Orphans Court."

It is insisted that the appellant has no rights which w affected by this decree; that he has no interest in the prope and that he is in no wise aggrieved by the order of the phans Court. That the commissioners were the mere a tioneers of the court, commissioned by the court to ascer

who would give the highest price for the property, and then to make report of that fact; that the appellant made his offer, and agreed to take the property at a certain price, provided the court would consent.

If this be the correct view of these sales, and the court should declare such to be the law, it will tend greatly to embarrass the proceedings under this statute. If a person making the highest bid, and to whom the property is *bona fide* struck off, acquires no rights; and if his bid is to be considered a mere offer by which he is bound, but which at a future period is to be accepted or rejected by the court at their mere will and pleasure, the natural tendency will be to discourage bidders, and depreciate the price of property at these sales. If it is not a legal discretion the court is to exercise, but if it is to look upon the bid merely as an offer made for the property, why is not the court bound at all times to set the sale aside, as a matter of course, if at any time before approval a better offer is made for the property?

If the court stands merely in the place of, and representing the owners, and in no other capacity, as was insisted upon at the argument, no one could complain of any unfairness in their pursuing such a course, and in fact their duty to the owners of the property would require them to do it.

These sales are made universally upon certain conditions, dictated by the commissioners under the advice and authority of the Orphans Court. One of the conditions always is, and it was one of this sale, that the highest bidder shall be the purchaser. He acquires, when the property is struck off to him, and he is declared the purchaser by the commissioners, a right not complete but inchoate; and that right is to have the court approve the sale, and to have a deed for the property, unless for good cause the sale should be set aside. If this right exists, and the court without good cause set aside the sale, and by their order and decree deny him this right, he is a person aggrieved by an order of the Orphans Court, and by the constitution has an appeal to the Prerogative Court. If he cannot strictly be considered a party to

the proceeding in court, still he is a person aggrieved, and such has a right to appeal.

When, in analogous cases, a right of appeal has been give that right has been so extended. It is not necessary th the person who appeals should be actually a party to t record, provided he has an interest in the question which m be affected by the decree or order appealed from. And agai "It has also been determined by the House of Lords that purchaser under a decree, though no party to the suit, m appeal from an order setting aside the bidding, and orderi a new sale before the master." 3 *Dan. Ch. P.* 99, and ca there referred to.

The order of the Orphans Court determined all the righ of this appellant, and if he cannot take this appeal he without remedy.

But it was further insisted that the matter determine upon by the Orphans Court was one submitted entirely their discretion, and cannot be reviewed; that the statu made it a matter of conscience with the individual membe of the court, and requires the court to *approve* the sale befo it is valid. The provision of the statute, to be found on pa 106, § 17, is, "That if the court, to which the report of t sale of such land or real estate shall be made as aforesa shall approve of such sale, it shall confirm the same as va and effectual in law."

But is not the court bound by law and in conscience to a prove it, if there is no good cause for refusing? And they mistake the law in the discharge of their duty in t respect, has the party aggrieved no redress? They ought approve it, unless there exists some good cause for their r fusing. It is not an arbitrary exercise of power committ to them, but it is a matter of judgment and of legal disc tion.

If the word "approve" was *not* in the statute they ou not to confirm the sale, if in their *judgment* the proceedi had been illegal, or if through any fraud, mistake, or ac dent the property had not been fairly exposed to sale.

I presume such has been the case in the sale we are considering. It appears that the Orphans Court had evidence and proof before them, upon which their judgment was satisfied that the sale had not been conducted according to law, and was accordingly set aside. But this appellant says they erred in judgment; that he is *aggrieved* by it, and that the constitution secures to him the right of appeal.

We are not without abundant authority in analogous cases upon this point.

In the case of *Collier*, appellant, and *Whipple*, appellee, 13 *Wendell* 224, a master sold mortgaged premises, and executed a deed. According to the then practice in New York, upon the master's filing his report of sale, an order for confirmation *nisi* was entered. A judgment creditor petitioned the Chancellor for a resale, and it was ordered. An appeal was taken from the order of the Chancellor, and the right of appeal not questioned.

In the case of *Tripp*, appellant, and *Cook*, appellee, 26 *Wendell* 143, a resale was ordered by the Chancellor. On the appeal from this order it was insisted it was a matter altogether in the discretion of the court, and this point was decided by the court. The Chancellor's order was reversed.

The case of *Delaplaine* v. *Lawrence, administrator, and others*, 10 *Paige Ch. R.* 602, is a case directly in point. The administrator sold certain lots under the order of the surrogate. When the report of sales came in he confirmed the sale of part of the lots, and the residue he ordered to be put up again and sold. C. B. Lawrence, one of the heirs, applied for a resale, and gave security that the property should produce a certain amount specified. Delaplaine, who was the purchaser, appealed to the Court of Chancery, to which court the appeal was given by the New York statute. The Chancellor says: "In sales made by masters under decrees and orders of this court, the purchasers who have bid off the property, and paid their deposits in good faith, are considered as having acquired inchoate rights, which entitle them to a hearing upon the question whether the sales shall

be set aside. And if the court errs by setting aside the sa improperly, they have a right to carry the question by appe to a higher tribunal." See 2 *R. S.* 610, § 104.

But it was asked by the counsel, on the argument, wh decree will this court make in the premises, should it co to the conclusion that the Orphans Court erred? Will order the court to *approve* what they *conscientiously* decla they cannot approve? No deed can be given—no title made by this court; the sale must first be *approved* by t Orphans Court, and this they refuse. Will this court *fo* their consciences?

I really do not see the slightest difficulty of the Orph Court carrying into effect the decree of this court, be it w it may, without any compunctions or violations of conscien They have conscientiously discharged their duty; they ha pronounced their judgment upon the law and the facts s mitted to them; they are ready and willing to carry t judgment into effect. But the law of the land interpos their judgment is appealed from; the constitution now s stitutes the judgment of this court in the place of theirs; a when this court shall pronounce its judgment, if it diff from theirs, by the law it supersedes their judgment, and becomes obligatory on their consciences to carry the ju ment of this court into effect in the stead of their own. T decree of this court will be, that, according to the law, Orphans Court ought to approve the sale of the commissi ers, order it confirmed, and a deed to be given to the p chaser. It will be an approval which they give under directions of a higher tribunal, and for which that trib is responsible, and not they. All that court will have t will be to carry the decree of this court into effect, and I not see but that they can do it without any conscientious sc ples. The proceedings will have been all according to law, the court below will be called upon simply to discharge duty.

The motion to dismiss the appeal is denied.

PETER S. CONOVER, appellant, and ALFRED WALLING and others, commissioners, &c., respondents.

Where objection is made to a sale by commissioners, by parties interested in proceedings for partition before the Orphans Court, the matter should be brought before such court by *petition*.

It is not proper to concert with an auctioneer a private signal denoting a bid at a sale of property by public auction. Such a contrivance gives an advantage to one person over the other fair and open bidders at the sale.

The mere fact that more is offered for the property sold at auction than it was cried off for, is no justification for a court refusing to confirm the sale. The practice of the English courts, in opening bids, has not been adopted by the courts of this state.

It is the custom in New Jersey, at public sales, where a bid is fairly claimed by two or more persons, to put the property up again at the price bid, and as at the bid of such one of the competitors as the auctioneer may declare entitled to it.

Where a mistake occurs in the biddings, which is brought to the knowledge of the commissioners, and they do not correct it by having the property again set up in the ordinary way, and it appears that a less price was obtained than otherwise would have been offered, the sale should be set aside.

A fair bidder at such sale, to whom the property is struck off, being an innocent party, ought to be put to no expense in the proceedings to set aside the sale, either in the Orphans Court or on the appeal to the Prerogative Court.

On the second day of September, A. D. 1851, G. P. Conover and Sarah H. Conover made their application, by petition, to the Orphans Court of the county of Monmouth for a division of real estate, of which they and others, named in said petition, were tenants in common.

The commissioners, Alfred Walling, John C. Conover, and William Statsen, having reported that a partition of the lands could not be made without great prejudice to the owners thereof, the court ordered a sale of the said real estate.

On the second of December, A. D. 1851, the commissioners

made their report of sales to the court in the usual form, among other matters, stating that they had sold the lan two tracts. "Tract the 1st, No. 1, being the westerly of said real estate, containing one hundred and fifty-one a more or less, situate in the township of Atlantic, in county of Monmouth, bounded on the north by lands o P. Conover and John S. Ely, on the east by lands of D Bray and the other half of said real estate sold Pete Conover, on the south by lands a part of the other of said real estate sold Peter S. Conover by said missioners and lands of Polhemus Smock, on the by lands of Gilbert H. Vanmater, was struck off sold to Daniel H. Ellis for the sum of eighteen thou three hundred and seventy-five dollars ($18,375). Tract 2d, No. 2, being the easterly half of said real estate, taining one hundred and forty acres, more or less, situat the township and county aforesaid, bounded on the nort land late a part, &c., (describing the same) was struck and sold to Peter S. Conover for the sum of twelve thou five hundred dollars."

On the coming in of this report, an application was m on behalf of the petitioners for division and of the o owners of the land, to disaffirm and disapprove so muc said report as related to tract No. 2, on the ground t owing to a misunderstanding on the part of the auctio who conducted said sale, the said tract sold for much than it otherwise would have brought, and that the com sioners ought not, under the circumstances of the case, to h acknowledged Peter S. Conover as the highest bidder.

Witnesses were examined, and evidence taken before Orphans Court, by which it appeared that Sarah Hol who was the owner of one half of the estate ordered t sold, employed Daniel H. Ellis as her agent to bid for he the sale, and authorized him, in writing, to bid $20,000 the first tract, and $15,000 for the second tract, struck o Conover; that prior to the sale, Ellis made an arrangem

with Henry W. Wolcott, the auctioneer at the sale, agreeing upon a private signal, which the auctioneer should take for a bidding; that it was arranged between them that as long as Ellis should keep his thumb in his button-hole he should be considered a bidder, and Wolcott should increase the bid in the same ratio as the preceding bidder; that the first tract was struck off to Ellis, he being the highest bidder, and bidding in the manner arranged as before mentioned; that Ellis kept his thumb in his button-hole during the whole of the bidding for the second tract, and was under the impression the auctioneer was bidding for him under the arrangement; that when the second tract was struck off to Conover, Ellis claimed the bid under the arrangement, but the auctioneer declared he considered that arrangement as relating only to the first tract.

On the hearing before the court, Sarah Holmes executed and delivered to the commissioners a bond binding herself to bid on a resale the sum of $13,500 for the tract in dispute.

After hearing the proofs and argument of counsel, the court, as to the second tract, ordered as follows: "And the court having further examined the said report, and it appearing to the court, by due proof, that the sale of the parcel of land described in said report as tract the 2d, No. 2, and shown on said map, was made upon due and legal notice as stated in said report, but that, owing to a misunderstanding between the said commissioners, the auctioneer, and Daniel H. Ellis, one of the bidders, as to whose bid it was, the said tract No. 2 was struck off to said Peter S. Conover, mentioned in said report, for a sum much less than it otherwise would have brought, and that the said commissioners ought not to have permitted the said tract No. 2 to be finally struck off to the said Peter S. Conover for the price in said report named, and that a confirmation of said report, so far as regards said tract No. 2, would operate great loss and injustice to the owners, the court do hereby disapprove and disaffirm said report and sale so far as relates to said tract No. 2, and do hereby refuse to approve the same so far as relates to said

tract No. 2, and do refuse to confirm the same so far as relates to said tract No. 2, and do order and direct and adjudge that said report and sale so far as regards said tract No. 2, and said sale of tract No. 2 to Peter S. Conover, be and the same is hereby annulled, set aside, and for nothing holden."

Peter S. Conover appealed from this order of the Orphans Court to the Prerogative Court, and stated and submitted to the court the following grounds of appeal:

1st. That the sale and report of said commissioners was an entirety, and could not be confirmed in part only.

2d. That it appeared, upon the hearing, that the sale to your petitioner was for a full price, without any illegality or fraud or malconduct on his part or on the part of any other person, and the court could not, at its mere volition and discretion, set the same aside.

3d. That the presentation of a bond in open court by Peter Vredenburgh, esq., counsel for those opposing said confirmation in behalf of Sarah Holmes, binding her to give for the property $1000 more than it was struck off at the first sale, was illegal, and an improper interference with the judgment of the court.

4th. That the court decided that the commissioners should have set the property up a second time at the sale, although fairly struck off to your petitioner, and the contesting bidder refused to have it set up again when offered by the auctioneer and commissioners.

5th. That the contesting bidder expressly agreed to leave to the auctioneer and commissioners, or one of them, the question who was entitled to the bid at said sale, and it was decided in favor of your petitioner.

6th. That the courts in this state have no legal right to open biddings, as in this case, for a mere increase in price.

7th. That the order of said court in refusing to confirm said sale should have likewise made an order for further sale of said property, which was not done.

8th. That the court did not order and adjudge that the

costs and charges of supporting said sale should be paid out of said estate, as it was bound to do.

9th. That the court did not order and adjudge that the costs, charges, and expenses incurred by your petitioner should be paid out of said estate, as it was bound to do.

10th. That the order and decree is in other respects informal, erroneous, and illegal.

W. L. Dayton, for appellant.

P. Vredenburgh, for respondent.

THE ORDINARY. At the last term of this court a motion was made, on behalf of the respondents, to dismiss this appeal, on the ground that the confirmation of the sale was a matter entirely in the discretion of the Orphans Court, and that an appeal would not lie from such an order of that court as was made in this case. I decided that the appeal was properly taken. I refer to the opinion then delivered as part of the history of the case.

The question now is, whether the order of the Orphans Court shall be affirmed.

I notice an informality in the proceedings of the Orphans Court, for the purpose of calling attention to it, that it may be avoided in future similar proceedings.

As the decrees and orders of the court below are matters of review in this court, any material matter or proceeding upon which such decrees and orders are founded should be so certified as to show the regularity and legality of the important steps taken in the progress of a case.

There is nothing upon the face of the proceedings sent here by the Orphans Court to show how the question arose before them, as to the mistake and misapprehension in conducting the sale, upon which they based their order now appealed from.

There is no dispute that the resale was asked for by or on behalf of the owners of the land, and was resisted by Peter S. Conover; but this does not appear on the records of the

court. The matter should have been brought before the Orphans Court by petition, which would have made the whole case complete, and would have been a proper foundation for the subsequent action of the court.

The review of this order of the Orphans Court has embarrassed me very much. If the question presented was between Peter S. Conover and Mrs. Holmes, or Peter S. Conover and Daniel Ellis, and in which no one else had an interest, I should have no doubt as to the law or equity applicable to this controversy. Mrs. Holmes or Mr. Ellis is not entitled to the favorable consideration of the court. It was the contrivance between Mr. Ellis, as the agent of Mrs. Holmes, and Mr. Wolcott, the auctioneer, and which was adopted for the purpose and with the expectation that Mrs. Holmes would thereby be enabled to purchase the property at a less price than by taking her chance on a like footing with her competitors at the sale, that has occasioned all the difficulty.

Mr. Conover was an open and fair bidder at the sale. His conduct is not impeached. What he said or did is no way connected with the mistake and misapprehension complained of. The property was not struck off to him at an inadequate price. By his contract to take the property at the price at which it was struck off to him, he acquired rights which a court of justice ought to protect, as well as the rights and interests of the owners of this property. But it is not Mrs. Holmes or Mr. Ellis who seeks redress for an injury which has been done them, but the owners of the property ask the interference of the court in the protection of their rights. The commissioners and auctioneer are the agents for both the owners and the bidders, who are alike entitled to relief against an injury which has been done them by any mismanagement, fraud, or accident on the part of their agents, provided the wrong committed can be remedied without doing greater violence to the rights of an innocent party.

The mere fact that Mrs. Holmes now offers to bid a thousand dollars more on a resale of the property, is no justification for the court's refusing to confirm the sale. The prac-

tice of the English courts in opening bids has not been adopted by our courts. Its tendency has been considered prejudicial to judicial sales.

But the Orphans Court did not proceed on this ground in refusing to confirm the sale. They state, in their order, that they refuse to confirm the sale because, owing to a misunderstanding between the said commissioners, the auctioneer, and Daniel H. Ellis, one of the bidders, as to whose bid it was, the land was struck off to Peter S. Conover for a sum much less than it otherwise would have brought, and that the said commissioners ought not, under the circumstances, to have permitted the land to be struck off to Conover.

Was there such a misunderstanding as prevented the property bringing a larger price than it would otherwise have brought?

Did the commissioners do wrong in permitting the property to be struck off to Peter S. Conover?

If both these questions can be answered in the affirmative, the Orphans Court did right in refusing to confirm the sale. For if the commissioners did wrong in permitting the property to be struck off to Conover, and thereby sacrificed the interest committed to their trust, the rights acquired by Conover were in violation of the rights of others, and are entitled to no superiority. By the use of the term *wrong* no moral guilt is imputed—no actual fraud—but such indiscretion and want of prudence as worked an injury, and ought to have been avoided.

That there was a misunderstanding between the auctioneer and Mr. Ellis, who was a bidder, is not disputed. Prior to the sale, Ellis saw the auctioneer, and told him he intended to bid for the property; that during the bidding he would put his thumb in the button-hole of his coat, and while it remained there the auctioneer should continue bidding for him, advancing each bid in the ratio or proportion of the immediate preceding competitor's bid. To this the auctioneer assented. The first tract was set up. Ellis bid for it in the manner agreed upon. His bid was taken accordingly by the

auctioneer, and the first tract was struck off to him for the sum of $18,375.

The second tract, the one in dispute, was then set up. Ellis stood a short distance from the auctioneer—immediately in front and in view of him—continuing the signal which had been proposed by Ellis, and which the auctioneer had agreed to take for his bidding. The auctioneer struck off the property to Peter S. Conover for $12,500. Ellis immediately claimed the bid.

There was no dispute as to Ellis having given the signal, and it is rather singular that the auctioneer should have made the mistake he did, and that after committing a mistake for which he was entirely to blame, should have persisted in declaring Mr. Conover the bidder.

Now how does the auctioneer account for the mistake? He says he did not consider the arrangement between Mr. Ellis and himself as extending to the second tract. But the history of the arrangement shows he had no right to adopt any such conclusion. To say the least of it, his conduct as auctioneer, in reference to this matter, was most imprudent and indiscreet.

When the arrangement was made, Ellis asked the auctioneer if he knew which part of the property was to be sold first. The reply was, he did not—he had heard nothing about it—but he presumed they would sell the part with the buildings first. Mr. Ellis replied, he thought so too. This is all that was said in reference to a *first* or a *second* tract, or as to the manner in which the property would be sold. Ellis then told him that "he wished to be a bidder, and a secret bidder." This is the account given by Mr. Wolcott himself, when sworn as a witness before the Orphans Court. He concludes the account of the arrangement between them, after stating Ellis' proposition as to the manner he would bid, in these words: "I agreed to that, and told him I would attend to it. It was understood between us, as long as Mr. Ellis kept his thumb in that position, I was to consider him a bidder."

what right had Mr. Wolcott to conclude that this
ıent referred only to the first tract, and more espe-
.en it was not known by either of them which tract
to be sold. The mystery of this mistake is not
by the subsequent conduct of the auctioneer.
ʼs he stood in the same position when he cried off
ıd, as when he cried off the first tract; that Mr.
ıd nearly in the same position, moving in the crowd.
ot notice that Mr. Ellis had his thumb in the same
he was where he could have seen his thumb in his
he had noticed; he did not look to see whether it
· not; Mr. Ellis remained near the same place when
the second, as when he cried off the first tract; he
ve seen him; he does not recollect that he saw Mr.
mb in that position during the second sale; he did
ɜ it when he was in the act of striking it off; if he
noticed it he should not have taken it, because it
ıvy property, and he thought Ellis was fully satis-
the purchase of the first farm, and if he had wanted
se the second, he (the auctioneer) thought Mr. Ellis
ve told him at the interview.
ınecessary to comment on this conduct of the auc-
ı show that the responsibility for the mistake, and
le that it has produced, rests altogether with him.
ı doubt as to the upright intentions of Mr. Wolcott.
is case he did not act the part of prudence.
ıe consequence of this mistake was a reduced price
'operty, is beyond a reasonable doubt. Mr. Ellis
gent of Mrs. Holmes. She had authorized him, in
.o bid for it $15,000. He declares it was his inten-
ave bid that sum, if necessary. Immediately after
Mr. Conover refused to take a thousand dollars for
in. From these facts, we may reasonably conclude
for this mistake, the competition would have been
ery materially to have increased the price of the bid.
estion remains, as to the propriety of the commis-
ı allowing the property to be struck off to Conover.

If this mistake was brought to the knowledge of the commissioners, at a time when it was proper to correct it, and when it might have been corrected consistently with the rights of all parties in interest, and the commissioners refused to correct it, they did wrong, and the Orphans Court were right in not confirming the sale.

It is customary in New Jersey, at public sales, where a bid is claimed by two or more persons, and there is really good ground for dispute as to the claim of the bid, to put the property up again at the price and at the bid of such one of the competitors as the auctioneer may declare in his judgment entitled to it. This is the fair way of settling such disputes, and it is a right which the owner of the property claims, and which he will exercise, because it is to his advantage to do so.

If the commissioners did not in this case conduct the sale in the usual way, and the owners of the property have been injured by their proceedings, the commissioners were in error, and the court, having the power to correct that error, ought to do so, unless the commissioners can in some way justify themselves in pursuing the course they did.

It is insisted, on behalf of the appellant, that when Ellis claimed the bid, the commissioners offered to set the property up again; that Ellis refused, and declared he would leave it to the auctioneer; that Conover acquiesced, and that the auctioneer decided in favor of Conover.

If this is so, there is no ground of complaint against the commissioners. If Ellis declined having the property put up again, it amounted to a refusal on his part to bid any more for the property; and as he was the only competitor to Conover, it was of no advantage to the owners to offer the property further, it might have operated to their detriment, for the effect of it would have been to relieve Conover from his bid. In this view of the case, Ellis declined the usual mode of settling such difficulties, and the commissioners adopted the only course left them, and are not reprehensible for it.

But does the evidence warrant this conclusion? Are the facts such as establish the premises from which it is drawn?

Mr. Wolcott (the auctioneer) says, "When it was struck off, I announced who was the highest bidder. I stated that the highest bidder was Peter S. Conover. When it was announced that Peter S. Conover was the highest bidder, Mr. Ellis claimed the bid. I replied to Mr. Ellis, that if he claimed the bid, it must be set up again, for I did not recognize a bid from him for that part of the property. Mr. Walling (one of the commissioners) spoke up, and said—yes, that was the way to settle the matter, for there were two claimants. Mr. Ellis replied that he would leave it to the decision of the auctioneer. Mr. Conover did not make any objection to that. The decision of the auctioneer was that Peter S. Conover was the highest bidder."

There is nothing in this evidence of Mr. Wolcott to show that Mr. Ellis declined the proposition to have the property put up again, except it can be implied from his reply to the remarks of Mr. Wolcott and Mr. Walling, that he would leave it to the auctioneer.

Mr. Ellis, in his evidence, says he did not wish to make a *fuss*, and said, I will leave it to *you*, by which he meant the *commissioners and the auctioneer;* that Mr. Walling then said, if there was any dispute it must be set up again; to which Mr. Ellis replied, very well, that is enough, and repeated it once or twice over. He further says, "when he said *that*, I expected it would be put up again, and did not think anything else.

Mr. Walling's testimony does not corroborate that of the auctioneer. He says, "when the property was struck off to P. S. Conover, I recollect that Mr. Ellis claimed the bid. There was something then said about setting it up, and something said about leaving it to the auctioneer, but don't think it was Mr. Ellis. I don't recollect that Mr. Ellis said "*very well.*" I think that some one said, leave it to the auctioneer —and Mr. Ellis assented to it.

It does not appear that the other commissioners took any

part in the matter, or that they were consulted or knew of the difficulty. They did not remedy the mista e as they ought to have done, and in the mode customary in conducting such public sales.

One thing is certain, the difficulty was not settled by the commissioners, who were the proper persons, and who ought to have settled it. Taking Mr. Walling's testimony to be correct, it is evident that the commissioners did not act in the matter for the interest of the owners of the property. All the commissioners, Mr. Walling and every one else, who had anything to say, seem to have treated the matter as one in which no person was interested but Mr. Conover and Mr. Ellis.

That Mr. Ellis did not make any further complaint after it was determined Mr. Conover should have the bid, but permitted the conditions of sale to be signed without remonstrance, does not alter the case. Mrs. Holmes complained, and said there was something wrong. Mr. Hubbard said it was not right. Mr. Ellis' conduct, subsequently, was such as might justly be considered as conclusive, as far as his own individual rights and interest were concerned, but ought not to prejudice the rights of others.

Without scrutinizing the evidence further, I think the impression produced by it is very strong that this property did not bring as large a price as it would have done if the commissioners had, when this mistake was ascertained, put the property up again, and settled it in the usual and customary way.

It was argued, on behalf of the appellant, that the arrangement between the auctioneer and Mr. Ellis was illegal and improper, and ought not to be favored or countenanced by the court. To this I assent. But the more improper and illegal was the conduct of the auctioneer, the more manifest is the wrong committed on the rights of the owners of the property, and the propriety of the court's redressing the grievance.

Upon a careful review of the whole case, I am unwilling

to say that the Orphans Court did wrong in making the decree they did. It must therefore be affirmed.

As to the costs, Mr. Conover must be put to no expense in prosecuting this appeal. He is an innocent party, and became involved in this controversy by the conduct of others, for which he is not responsible.

As the case is before me, I have no right to give directions as to any other costs, except of this appeal; but I have no doubt, as to other costs incurred by Mr. Conover, the Orphans Court will see the propriety and justice of their being paid out of the money raised from the further sale of the estate.

WILLIAM WINANTS, executor, appellant, and MARIA TERHUNE, respondent.

The personal property of a testator is by law the primary fund out of which the debts are to be paid.

Properly nothing is the personal estate of the testator which was not so at his death.

If a testator directs lands to be sold and converted into money to *pay his debts*, the proceeds become a fund which is liable for his debts.

But where the conversion of the land into money is ordered in the will for a *specific purpose*, as if the direction is to convert the estate in order to give a legacy, the creditors cannot claim the money as personal estate.

The will in question contained the following clause: "I also order my executors to sell my house and lot at Binghampton, Broome county, and state of New York, as soon as conveniently can be after my decease, and to execute lawful deeds for the same, if I don't dispose of the same in my lifetime; and the money arising therefrom must be paid by my executors towards the debt of my son Peter, where I am bound as surety for my son Peter; the remainder of the purchase money of the house and lot, if any there should be, I give unto my daughter-in-law Charity Ann, the wife of my son Peter." The executors sold the premises, and there was a remainder after paying the debts specified; and on an application to the Orphans Court for an order to sell lands on a deficiency of personal property to pay debts, that court refused the application on the ground the remainder of the proceeds of the sale of the Binghampton property was personal estate, and must be applied to the payment of the several debts—

Winants *v.* Terhune.

Held, in the Prerogative Court, reversing this decision of the Orphans Court, that the proceeds of the sale of the Binghampton property could only be regarded as personalty for the *specific purposes* designated in the will, and that an order should be made to sell lands to pay the general debts.

A. O. Zabriskie, for appellants.

Hopper and *Banta*, for respondents.

The following state of facts is agreed upon by the parties and their counsel to be used upon the hearing of the appeal.

That it was shown to the Orphans Court, upon hearing the application, that the rule to show cause has been duly advertised in the manner prescribed by law.

That there was no evidence of any personal property, other than the sum of four hundred and seventy-one dollars and ninety-three cents, set forth in the two items of amounts of debts and credits.

That it was shown to the court, by proof, that all the items set forth in the account of debts and credits rendered by the executor were debts due from the deceased, except the sum of forty-three dollars and forty-seven cents, stated to be due to Stephen Goetchius, and except the item of fifteen dollars, for funeral expenses, which sum was paid by the executor to Peter I. Terhune, the father of the deceased, upon his allegation that he had advanced it to the widow for funeral expenses, which debt so proved, after deducting the said two sums, amounts to nine hundred and seventy-two dollars and seventy-six cents.

It was further shown that the amount of four hundred and sixty-three dollars and seven cents of said debts had been paid by said executor, besides the fifteen dollars for funeral expenses and the sum of twenty-five dollars paid Richard R. Paulison, for surrogate's and Orphans Court's fees, in the settlement of this estate.

It was shown, by proof, that the said testator had real estate in the county of Bergen, consisting of a farm, containing fifty-eight acres, and three out-lots, containing seventeen and

one half acres, and the situation and relative value of said and was shown.

The will of the deceased, with the probate thereof, was offered in evidence, *pro ut* the same.

The inventory of the estate of deceased was offered in evidence, *pro ut* the same.

It was shown that deceased died, on January 20th, 1851, leaving ten children, seven of whom were minors under the age of twenty-one years.

It was shown that the deceased had a house and lot at Binghampton, Broome county, state of New York, which was conveyed to him by his son Peter, June 11th, 1850, for the sum of twenty-three hundred dollars, six hundred and seventy dollars of which sum the deceased was liable to pay on notes of that amount on which he was security for his son Peter, six hundred and seventy-five of which the deceased borrowed on his own sundry notes for his son Peter, and the sum of one thousand dollars of which was cash, which the deceased lent to Peter; that said property was subject to two mortgages, amounting to seven hundred and fifty dollars.

It was shown that the consideration of the deed for the Binghampton property from Peter to testator was for money taken up by deceased for his son Peter, and also for what money he had lent him; and the arrangement between the deceased and his son Peter, when deceased took the deed from Peter for the Binghampton property for this money advanced to Peter, was that when Peter could pay one thousand dollars on the property, he would reconvey it to Peter, and take a mortgage for the balance. Peter was to pay him the whole amount either in cash or securing him by mortgage as above.

It was shown that the three items, of six hundred and seventy dollars, six hundred and seventy-five dollars, and one thousand dollars, were charged against Peter in a small book kept by the deceased, and shown the executor.

Five letters from Peter to the testator, dated June 11th, June 16th, June 24th, January 9th, and February 24th, 1850, were offered in evidence, *pro ut* the same.

It was shown that Peter had leased the store on the Binghampton property for two hundred dollars per year, which lease he gave to the deceased. Peter, with his family, also lived in the house, which contained four living rooms besides bed-rooms.

It was shown that the personal property was sold by the executor to the widow of testator at inventory prices, and paid for by her.

It was shown that the executor, without having proved the will in the state of New York, sold and conveyed the house and lot at Binghampton, Broome county, New York, mentioned in the will of the testator, to Charity Ann, the daughter-in-law of the testator, and wife of his son Peter. That the consideration mentioned in the deed was two thousand dollars, of which the two mortgages, with interest due thereon, formed part, and the sum of seven hundred and sixteen dollars and forty-five cents was paid in discharge of five notes of the testator's son Peter, whereon the testator was security, and on which said sum was due, and the residue of said consideration, amounting to eight hundred and thirteen dollars, was retained by Charity Ann, the wife of Peter, being claimed by her by virtue of the bequest to her in the will, as by a receipt from said Charity Ann to said executor, dated June 2d, 1851, which said receipt was offered in evidence, *pro ut* the same.

It was shown that Richard R. Paulison, an attorney at law, who drew the deed for the Binghampton property to Charity Ann, advised the executor, that if they chose to take the deed without the will being proved in the state of New York, it was no matter to him, the executor. The whole arrangement was so done to save expense.

It was shown that there was an order to limit creditors, and a final decree thereon by the Orphans Court of Bergen county, and that the executor had not filed any refunding bond in the surrogate's office.

It was further shown that the five notes above mentioned, upon which the testator was security for his son Peter, were

paid and taken up by said Charity Ann, and delivered by her to the executor in part payment of the consideration money of the deed to her.

It was further shown that part of the money, which the deceased borrowed on his own sundry notes for his son Peter, forms part of the indebtedness of the estate of testator, as exhibited in the amounts of debts and credits by the executor, consisting particularly of the following: Lawrence J. Ackerman, the sum of three hundred and fifty dollars and fifty-seven cents; Henry Ackerbach, the sum of fifty-four dollars and twenty-five cents; Christian W. Campbell, the sum of one hundred and eight dollars and sixty-nine cents, and Harman Van Dien, the sum of two hundred and seven dollars and twenty cents.

The executor presented his petition to the Orphans Court, praying a sale of the testator's lands to pay the debts. The respondent showed cause, and the Orphans Court, after hearing the parties, made an order refusing the application. From this order an appeal was taken to the Prerogative Court. The following is a copy of the will referred to in the state of the case:

In the name of God, amen. I, Henry L. Terhune, of the township of Hoboken, in the county of Bergen, and state of New Jersey, being weak in body, but of a sound disposing mind and memory, blessed be Almighty God for the same, do make and publish this my last will and testament in manner and form following, that is to say: *First.* It is my will, and I do order my executors herein after named to satisfy and pay all my just debts and funeral expenses as soon as conveniently can be after my decease. *Secondly.* I give, devise, and bequeath unto my beloved wife, Maria Terhune, all the remainder of my personal estate and all my land and real estate in the state of New Jersey to her own use till my youngest child arrives to the age of seventeen years, then I order my executors to sell all my land and real estate in the state of New Jersey, and to execute lawful deed or deeds for

the same, also all my personal estate, either at public or private, as they shall think proper; the money arising from the sale of my real and personal estate, the one-third thereof, must be put to interest by my executors, and the interest arising therefrom must annually be paid to my said wife Maria, as long as she shall remain my widow, in lieu of her right of a dower in all my estate; the remainder, two-thirds of the purchase money, must be equally divided between my children, share and share alike, after the death or intermarriage of my said wife; the principal sum that was put to interest by my executors must be divided between all my children the same as the aforesaid two-thirds of the purchase money. I also order my executors to sell my house and lot at Binghampton, Broome county, and state of New York, as soon as conveniently can be after my decease, and to execute lawful deeds for the same, if I don't dispose of the same in my lifetime, and the money arising therefrom must be paid by my executors towards the debt of my son Peter, where I am bound as surety for my son Peter; the remainder of the purchase money of the house and lot, if any there should be, I give unto my daughter-in-law Charity Ann, the wife of my son Peter, which I give unto her for her own separate use, and by taking her own separate receipt therefor. The share herein before given to my son Peter must be paid to my daughter-in-law Charity Ann, the wife of my son Peter for her own separate use, and by taking her own separate receipt therefor. And lastly, I do nominate, constitute, and appoint William Winants and Henry Ritan executors of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof, I have hereunto set my hand and seal this twenty-first day of September, in the year of our Lord one thousand eight hundred and fifty (1850).

Signed, sealed, published, and declared by the above named Henry L. Terhune to be his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses in the presence of the testator and of each other —

HENRY L. TERHUNE.

THE ORDINARY. The important question presented is, whether the eight hundred and thirteen dollars, which the executor realized from the sale of the Binghampton property, after paying seven hundred and sixteen dollars and forty-five cents in discharge of debts for which the testator was bound as security for his son Peter, were assets in the hands of the executor for the payment of the testator's debts. The Orphans Court decided that they were, and on that ground refused a decree for the sale of the lands of which the testator died seized.

The statute provides, that if, on full examination, the court shall find that the personal estate of the testator or intestate is not sufficient to pay his debts, they shall order and direct the executor or administrator to sell the whole, if necessary, of the lands, &c., for the purpose, or so much thereof as will be sufficient.

Were the assets in the executor's hands personal property, which by law he could apply for the payment of the outstanding debts of the testator?

The executor was ordered, by the will, to sell the house and lot at Binghampton for a specific purpose. That purpose was, to take the produce of the sale, and pay, first, the debt of the testator's son Peter, where he was bound as surety for his son, and the "remainder," if any there should be, the testator says, "I give unto my daughter-in-law Charity Ann, the wife of my son Peter, which I give unto her for her own separate use and by taking her own separate receipt therefor."

The argument on behalf of the respondent is, that the executor sold the Binghampton property, and thereby converted it into personal property; that the personal property is the primary fund which is to answer for the debts, and therefore this, as personal property, must be so appropriated.

It is true the personal estate of the testator is by law the primary fund out of which the debts are to be paid. But, as was said in *Mangham* v. *Mason*, 1 *Ves. & B. Rep.*, "Properly nothing is the personal estate of the testator that was

not so at his death." If a testator directs lands to be sold and converted into money to pay his debts, the proceeds become a fund which is liable for the debts of the testator, not because it is personal property, but because it is so appropriated, not *by law* but by the *will* of the testator. The testator ordered this land to be converted into money for a specific purpose. If the executor can appropriate it for any other purpose, it will be in direct violation of the will of the testator. He cannot do it without violating both the law and the testator's intention, unless, because it has been converted into money, the law will stamp it as personal property for any other purpose than that designated by the testator.

In *Gibbs* v. *Ougier*, 12 *Ves.* 413, the master of the ro[illegible] says: If you can find a substantive and independent inte[illegible] tion to turn the real estate, at all events into personal, th[illegible] will do: not where there is only a specific purpose, and [illegible] conversion, except to answer that purpose, as if the dire[illegible] tion is to convert the estate in order to give a legacy, t[illegible] creditors cannot come and take that from the legatee, mere [illegible] as that is the mode in which it is given to him. In th[illegible] case the executors were ordered to sell all the testator's lan[illegible] and to dispose of it to different legatees. There was no pr[illegible] vision for the payment of the debts. A creditor, by simp[illegible] contract, filed his bill praying the usual decree, and that, [illegible] case the personal estate should not be sufficient to satisfy t[illegible] debts, the real estate might be declared liable to make go[illegible] the deficiency. The counsel argued it was the intention the testator, to all intents and purposes, to convert the re[illegible] estate into money, by the effect of which direction it w[illegible] mere personal estate, and would be taken as such by t[illegible] executor or next of kin, and by analogy the court shou[illegible] say it could not be got at without paying the debts. B[illegible] the court decided that the creditors could not take the esta[illegible] from the legatee merely, because, on transmitting it from t[illegible] hands of the executor to the legatee, it assumed the shape personal property. It was converted for one specific purpo[illegible] for that only was personal property.

It makes no difference, in respect to this question, in what quality the devisee took the property, whether as real or personal. As far as she was concerned it was personal property; for, as such, it was the intention of the testator she should take it. In the event of her death it would have gone to her personal representative. But the land was converted for no purpose except that which the will directed; and if the creditors have any claim to it, they must show it under the will. The conversion was merely the mode in which the estate was given for certain specific purposes; and simply because that mode has been adopted, it cannot so change its character as to defeat the intention of the testator. The executor had no right to take the proceeds of the sale for any other purpose but that directed by the will. It was not personal property for any other purpose. It is admitted that without this fund the personal estate of the testator was deficient. In contemplation of the statute, then, the personal estate of the testator was not sufficient to pay his debts.

But, on behalf of the respondent, it was further insisted that part of the debts remaining unpaid were debts which were to be paid out of the proceeds of the Binghampton property. The debts to be paid out of this fund were the debts of Peter, for which the testator was bound as surety. The Binghampton property had been purchased by the testator of his son, for the sum of $2300, six hundred and seventy dollars of which sum the testator was liable to pay on notes of that amount on which he was security for his son; six hundred and seventy-five dollars money, borrowed on his own notes for his son, and one thousand dollars cash, which he had lent to Peter. These several items the testator had charged against his son in a small book kept by him. It was insisted that it was the testator's intention that the proceeds of the sale of the property should pay these several sums of money. The language of the will does not admit of such a construction. The fund was bound for no debts except such as the testator was bound as surety for his son *at the time the will was made.* It was competent for the respondent to show what debts the

testator was surety for at the time of making the will. The will does not show on its face what these debts were, and extrinsic evidence must necessarily be resorted to for the purpose. It does not appear, by the case agreed upon, that there were any other such debts, except those amounting to $716.55, due upon the notes of his son, on which the testator was security.

With the view I have taken of the case, it is unnecessary to examine the question, as to the effect upon the point in controversy of the executor's having sold the Binghampton property without first having taken out letters testamentary in the state of New York.

The case must be remitted to the Orphans Court, with directions to proceed and make decree for the sale of the real estate of the testator to pay his debts, or so much thereof as may be necessary for the purpose.

JOSEPH BROKAW, by his guardian, appellant, *vs.* PETER C. PETERSON and JOHN V. M. QUICK, respondents.

The word children does not, ordinarily and properly speaking, comprehend grandchildren, or issue generally. Their being included in that term is permitted in two cases only, *viz.* from necessity, which occurs when the will would remain inoperative unless the sense of the word *children* were extended beyond its natural import, and where the testator has clearly shown, by *other* words, that he did not intend to use the term children in its proper actual meaning, but in a more extensive sense.

Courts of probate are not governed by the same strict rules as a court of construction in reference to the admission of parol evidence. There are a number of cases where mistakes made in preparing a will have been corrected.

Decedent made a will, dated 14th January, 1845. He had then living one son, seven daughters, and four grandchildren, the children of a deceased son. The testator gave to his daughter, Elizabeth, a certain portion of his real estate, and then directed his executors to convert the residue of both real and personal estate into money, and to distribute the same as follows: To his son Peter, two shares; to each of his daughters, with the exception of Elizabeth, one share; and also one share to his four

grandchildren, the children of his deceased son Garret. It was further provided, that if any of said children should die previous to said distribution, the share of such child so dying should go to his or her children. In the year 1850, one of the testator's daughters died, leaving a son, and who, under the above provision of the will, would have taken the share of his mother. The testator then, in 1851, made a second will, in most of its provisions similar to the former one, but with the exception that, after providing for Elizabeth, the devise is made to his *three*, instead of *four* daughters. This will then also provides that, in case of the death of any of his children, the share of such child shall go to his or her children. Under this will it was clear that the son of the deceased daughter would not take. Evidence was offered to show that it was the intention of the testator, by his last will, to give to the son of the deceased daughter the share which would have come to him by force of the former will. *Held*, that as there was no ambiguity on the face of the will, as there was no fraud, and no mistake by the testator as to any fact, the court could not reform the will so as to make it correspond with the presumed intentions of the testator.

H. M. Gaston and *G. H. Brown*, for caveators.

J. F. Randolph, for executors.

THE ORDINARY. One of the papers in question was admitted to probate by the surrogate of the county of Somerset, as the last will and testament of Cornelius Peterson, deceased. It bears date the fourteenth day of October, 1851. Joseph Brokaw, by his guardian, Frederick D. Brokaw, has appealed from the adjudication made by the surrogate; and the object of this appeal is to reject this paper, and admit to probate another paper writing, purporting to be the last will of the said Cornelius Peterson, or else to admit this other paper, in conjunction with the one proved, in aid of the construction of some of the provisions of the one already admitted to probate.

Waiving all considerations as to the character of this appeal, and the manner in which the questions involved are brought before the court (as they were not questioned on the argument), I shall proceed to decide upon the merits of the case.

On the fourteenth day of January, 1845, Cornelius Peter-

son had then living one son, seven daughters, and four grandchildren, the children of a deceased son. On that day he made his will. By it he disposed of all his property, and made provision for all his children and for the children of his deceased son. The clauses of the will, by which he disposes of his estate, are as follows:

"*Item* 3d. I give and devise to my executors the farm containing about sixty-six acres eighty-four hundredths of an acre, more or less, which I lately purchased of John Van Zant and wife, and three acres of woodland, I lately purchased of Abraham Davis and wife, situated in Hillsborough, in trust for the use and benefit of my daughter Elizabeth during her natural life, and at her death I give the same to her lawful issue equally, and those who represent them.—*Item* 4th. I authorize my executors, herein after named, to sell and dispose of all the residue of my real and personal property to the best advantage, and the money from thence arising I give to my children, as follows: To my son Peter two shares, to my daughters one share, excepting my daughter Elizabeth; but should the shares of my daughters exceed two thousand three hundred dollars, the price I paid for said farm, then said Elizabeth to be made equal with her sisters in worth even amount they and each of them may receive over said sum of two thousand six hundred dollars.—*Item* 5th. To the four children of my deceased son Garret, to wit Ellen, Ann Maria, Catharine, and Elizabeth, and to the survivors of them, I give a daughter's share, and they to share equally.—*Item* 6th. If in the course of human events any of my children should die previous to the division of my estate then that *child* share to descend to his or her child or children, but if no child or children, then to fall in the residue of my estate, and to be divided as aforesaid."

After making this will, and in the year 1850, Adeline, one of the daughters, died. She left an only son, Joseph Brokaw, who is the appellant in this case. Under this will, he undoubtedly stood in the place of his mother, and was en-

tled to one share of the residuary estate, as it was apportioned in the will.

On the fourteenth day of October, 1851, Cornelius Peterson made the will admitted to probate. By it the same devise is made to the daughter, Elizabeth, the same directions given to the executors to sell the residue of his real and personal estate—then follows, "and the money from thence arising I give and bequeath to my children as follows, *viz.* I give to my son, Peter C. Peterson, two shares, to my daughters one share, except my daughter Elizabeth; but should the shares of my other daughters exceed two thousand six hundred dollars (at which sum I value the real estate devised in trust to my daughter Elizabeth), then in such case said Elizabeth to be made equal with her sisters in whatever amount they and each of them may receive over said sum of two thousand six hundred dollars." Then follows the devise to his grandchildren, children of his deceased son Garret, the same as in the former will of 1845, with the exception that the devise is made to his *three* instead of *four* children, one of them having died in the intervening period between the execution of the two papers. He then, in like manner as in his previous will, provides that, in case of the death of any of his children previous to the division of his estate, then the share of such deceased child shall go to his or her child or children.

Under the last will, the appellant can take no interest in the testator's estate; for, by its terms and legal construction, he cannot be substituted in the place of his mother. Under the first will he would take; for by it a portion of the testator's estate was given to each of his children, of whom the appellant's mother was one; and it was provided, that if either of the children should die before the estate should be divided, then the share of such deceased child should go to his or her child or children. By the last will, a portion was in like manner given to each of the testator's children, but at the time of the execution of the will the appellant's mother

was dead, and there is nothing in the will to authorize a grand child to be substituted for its parent.

The word "children" does not, ordinarily and properl speaking, comprehend grandchildren or issue generally Their being included in that term is only permitted in tw cases, *viz.* from necessity, which occurs when the will woul remain inoperative unless the sense of the word "children were extended beyond its natural import, and where the tes tator has clearly shown by *other* words that he did not inten to use the term "children" in its proper actual meaning, bu in a more extensive sense. 1 *Roper on Leg.* 69.

Courts have inclined towards giving a liberal constructio to wills in order to prevent the exclusion of the issue of deceased child. But the principle upon which the cases relie upon by the appellant's counsel were decided does not brin the present case within the exceptions to the general rule.

In the case of *Giles* v. *Giles* (8 *Sim.* 360), the Vice Chan cellor let in an issue of a deceased child, who was decease at the time of the execution of the will. But he determine that such was the intention of the testator, to be collecte from the whole will. He expressly disclaimed any intentio of infringing upon the general rule. *Jarvis* v. *Pond* (9 *Sim R.* 549) was determined upon the intention of the testat appearing on the face of the will, and also to make the w operative, there being no children to answer the term "daug ters," as it was used, except the issue of two deceased daugh ters.

In the will of Cornelius Peterson there is nothing fro which such an intention can be inferred. The testator giv to his son, by name, one share of his residuary estate, and his "daughters" one share each. This could only refer his *daughters* then living. He provides for the issue of deceased son, and their representatives as a distinct clas then he declares, "if in the course of human events any my children *should* die," referring to an event in *futuro*.

But, on behalf of the appellant, it is alleged that the [redacted] a mistake on the part of the testator in not providi

for the appellant, and that he meant this will to be the same in this respect as the will of 1845, and that it ought not to be considered as his last will, unless it is taken in conjunction with the will of 1845; that by the will of 1845, the appellant was provided for; that the testator did not intend to alter his will in this particular; that he so declared, and that the will of 1845 was copied without the testator's being aware of the fact, that the change of circumstances which had occurred by the death of his daughter Adeline affected the legal construction of the terms used; that the will of 1845 contained his instructions to the scrivener, and that these instructions have not been carried out; and that unless those instructions are admitted as part of his will, and the will made to conform thereto in respect to the appellant, the intention of the testator will be defeated.

The proposition is a plausible one, but it will not bear the test of close scrutiny, and cannot be established without violating long established and wholesome principles of law.

There is no ambiguity upon the face of this will. Its language is certain and precise, and the terms and provisions free from any doubt as to construction. The objects of the testator's bounty—the property devised—the character and extent of the devises and bequests—are all free from ambiguity. There is no necessity of introducing parol testimony to explain any ambiguity, either *patent* or *latent*. Nor can this will be touched on the ground of fraud; for it is not pretended that the testator was even advised as to its terms or mode of execution. There was no *mistake* as to any fact; for the testator was well acquainted with all the facts which have any connection with the property the subject of the devise and with all the individuals whom he made the objects of his bounty. There was no mistake in the scrivener, as to following the instructions given him as to the draft of the will. He obeyed his instructions literally. There was nothing said to the scrivener by the testator, in giving the instructions, to indicate that the legal import of the language which he directed the scrivener to employ was not perfectly

understood and comprehended by the testator. We have the fact that a will was executed in 1845, under the provisions of which the appellant would have been entitled to a portion of the testator's estate. In 1851 he made a new will. It is offered to prove, and it is proved, that prior to making the last will the testator declared he wanted a new will drawn because there were interlineations and misspelling in the first will; that he wanted to make a change in the valuation of the real estate he had devised for the benefit of his daughter Elizabeth, and to change the devise as to the children of his son Garret, one of them having died. The declarations of the executor and of the different devisees under the will are proved to show that they always supposed, and that they believed the impression of the testator to have been, that he had provided in this will for his infant grandson. The evidence is sufficient to show that those interested in this estate should never have compelled this appellant to resort to litigation to secure that portion of this estate which it is perfectly manifest his grandfather intended he should have, and yet I do not think it is sufficient to justify me in giving the appellant any relief upon this appeal.

It is true that a court of probate is not governed by the same strict rules as a court of construction in reference to the admission of parol evidence. In *Castell* v. *Tapp*, 1 *Curt.* 298, this court went so far as to insert in a will a legacy which by mistake had been omitted. There are a number of cases where mistakes made in preparing the will have been corrected. 1 *Jarman on Wills by Sweet* 372.

I have examined with great care all the authorities relied upon in this argument, but am unable to find a warrant in any of them to justify me in relieving the appellant in the present case. In *Burgess* v. *Wheate*, 1 *Eden* 233, the surrogate certainly went very far in admitting evidence and correcting the alleged mistake. Yet that case is distinguishable in principle from the one before us. The testator devised all his real estate to his mother and sister, and his personal estate to an illegitimate daughter. He had

real estate, but was the owner of a store in Greenwich street, which was in fact leasehold estate. He told the scrivener who drew the will that this store was all the real estate he had, and the scrivener, instead of devising the store *eo nomine* to the mother and sister, called this leasehold estate real estate. The surrogate established the will as to the personalty except as to the leasehold premises given to the mother and sister. It will be perceived that the surrogate did not go so far as to correct the mistake by giving the leasehold, as the testator intended, to the mother and sister. It resulted in this, as they were the testator's only personal representatives, and entitled to his personal property.

The cases cited in *Fawcett* v. *Jones*, 3 *Phill.* 442, 1 *Eng. Ecc. R.*, and in the notes, are cases of fraud, mistake, or accidental omissions. They were proved not merely by the declarations of the testator to have been mistakes or omissions, but by the written instructions or memoranda from which the wills were drawn, or by the scrivener to whose neglect or oversight the omissions were attributed. Others are cases where some ambiguity, apparent on the face of the will and parol evidence, was admitted to explain it. As in the case of *Gerrard* v. *Gerrard*, referred to in 3 *Phill.* 444, there was an ambiguity on the face of the will: the words were, "I appoint her executrix and residuary legatee." In the instructions for the will the testator had directed his attorney to insert his wife as residuary legatee. In transcribing the will the testator had not noticed the blank which had been left by the attorney for the insertion of the wife's name.

My conclusion is, that the will of 1851 was properly admitted to probate without any accompanying explanation or qualification.

FRANCIS A. STACKHOUSE and others *vs.* SILAS HORTON and others.

In questions of testamentary capacity the abstract opinion of any witness, medical or of any other profession, is not of any importance. No judicial tribunal would be justified in deciding against the capacity of a testator upon the *mere opinions* of witnesses, however numerous or respectable. The opinion of a witness must be brought to the test of facts, so that the court may judge what estimate the opinion is entitled to.

Testamentary capacity is to be ascertained by the court by the application of certain rules of law in the exercise of a sound discretion regulated by these rules.

A monomaniac, under certain circumstances, may make a valid will.

A person may be the subject of a partial derangement towards a particular individual, and this derangement may be the cause of depriving such individual of the bounty of a testator, and yet a will made by such person may be valid; the court will not refuse probate to such will, unless by doing so the person concerning whom the delusion existed will be benefited.

Costs to be allowed in matters of probate.

In the matter of proving the last will and testament of Esther Horton, deceased; appeal from the Orphans Court of the county of Morris.

J. J. Scofield and *Whelpley*, for appellants.

T. Little and *A. O. Zabriskie*, for appellees.

THE ORDINARY. The decedent, Esther Horton, died in February, 1852. She was upwards of seventy years of age. She had been feeble in bodily health for seven or eight years prior to her decease. During the last four months of her life her decline was rapid. Her disease was an affection of the lungs. It finally assumed the shape of consumption, of which she died. For the last three years of her life she was deprived of her sight—most of that period totally blind. Silas Horton, her husband, died in December, 1842. There was no issue of their marriage. It nowhere appears, in the

luminous testimony taken, what relatives Silas Horton left his decease. The numerous individuals by the name of orton mentioned in the paper offered for probate, and hers by that name connected by the evidence with this case, 'e the blood relations of Esther Horton. Whether they ere of any relationship to Silas Horton, deceased, does not)pear. Silas Horton died seized of a large real and per-)nal estate. His personal property was inventoried at nearly venty-nine thousand dollars. Of this his widow received, y his will, about sixteen thousand dollars, and the real es-)te devised to her is valued at upwards of ten thousand dol-rs. She died seized of the same real estate devised to her y her husband; and the personal property which she re-)ived under the will of her husband accumulated in her)nds, so that the amount, at the time of her death, exceeded venty-one thousand dollars. The disposition made by her : this real and personal property by the paper writing pro-)unded for probate is the origin of the present controversy.

Esther Horton left a paper writing, bearing date the 13th ay of January, 1852, purporting to be her last will and stament; and it was offered for probate in the surrogate's fice of the county of Morris by Jacob H. Crammer and illiam Logan, named therein as executors. Four caveats ere filed. One by Silas Horton, who is a nephew of the cedent, but not one of her next of kin, his father, Aaron orton, being alive; Aaron Horton, a brother of decedent; san McCollum, a sister, and Curtis Coe, a nephew and e of the next of kin, each filed a caveat.

After a protracted investigation before five judges of the rphans Court of the county of Morris, that court (two of e judges dissenting) adjudged and decreed that the instru-ent offered for probate is not the last will and testament of e said Esther Horton, deceased, and probate thereof was nied by the court. The court did further order that the sts of both parties to the litigation before them should be id out by the estate. The court taxed the costs for the rvices of the judges at two dollars a day, each, making

$690; for the counsel of the will $1250; and for the cc of the caveators $1250. The surrogate's fees are tax $296, including $20 for reading the depositions; sh fees for serving citations $21.64; stationery is charged $1 These expenses are independent of the witnesses' fees, were ordered to be paid, but the amount of which I d find carried out in the bill of expenses. The whole ar of costs is nearly four thousand dollars.

From these orders an appeal was taken to this cou must determine whether the Orphans Court was right fusing this writing probate; and it is my further du decide whether the costs taxed by that court shall be out of the estate.

The caveators object to the writing offered as the las and testament of Esther Horton, as follows, on the grou

1st. Of the general incapacity of the decedent to m will at the time of the execution of this paper.

2d. That if of sufficient general legal capacity, ye decedent was the subject of monomania in reference t of her relations, who had claims upon her bounty, so ing her affections and understanding as to prevent her ma a disposition of her property in conformity with her re fections and her moral obligations.

3d. That the execution of the paper was the result o proper influence and fraud.

The witnesses who express opinions unfavorable to th pacity of the decedent to make a will, as well as the upon which their opinions are based, are few, notwiths ing the unusual amount of evidence that has been pr into the case, the larger part of it wholly irrelevant which should not have been admitted by the court. not contended, nor was any effort made to prove that th cedent was *naturally* a woman of feeble intellect. Or contrary, the whole evidence taken on both sides shows she possessed at maturity rather a strong mind. She self-willed, impetuous, and unusually susceptible to p dices. She had an opinion of her own, in state as w

domestic affairs, and her opinions in these matters were neither singular or erratic. Her business capacities are abundantly proved by the fact, that she maintained always, even up to the day of her death, the control and management of the estate left her by her husband, selecting her own agents to aid her without any dictation from others, and herself directing those agents, and they submitting to her judgment, without ever questioning its propriety. But it is contended that her mind began to fail her soon after the death of her husband; that from that time her body began to yield and give way to a slow but a steady and wasting disease, and that with her body there was a natural decay of her intellect, which became so feeble, during the last few months of her existence, as to deprive her of those qualities of mind which capacitated her for the important duty of disposing of her property by a last will and testament.

That the mind of the decedent was broken, impaired, and shattered by disease, is beyond question. But with such a standard of capacity, very few who had reached the age of three score and ten years would be deemed competent to make a final disposition of their property. Did the decedent *comprehend* the act she was performing? And was her mind strong enough to form a fixed intention, and to summon her scattered and enfeebled thoughts, so as to enable her to execute that intention? If she did not comprehend the act, or, if comprehending it, she could not control the feeble faculties of her mind, so as to enable her to execute her intention, then she was not capacitated to make her will; it matters not whether such incapacity was the effect of a disordered or an enfeebled intellect. But although the numerous authorities, in our own and other courts, touching the subject of testamentary capacity, were ably reviewed and criticised by counsel in this case, I deem it unnecessary to do more than adopt for my guide, in this investigation, the rule laid down by Judge Washington, in *Den* v. *Vancleve*, in the Circuit Court of the United States for this district. That rule has been approved and acted upon by my predecessors; it com-

mends itself to my own judgment, and I do not feel willing, nor is it necessary in the present instance to question its propriety or complain that it is not sufficiently rigid in the standard it fixes for the mental capacity of a testator. "He must," in the language of the law, "be possessed of sound and disposing mind and memory. He must have memory; a man in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this—had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

Was the decedent of disposing memory? It is a most singular fact, that here was an aged female—you may with some propriety say *alone* in the world, declining in health during the last eight years of her life—managing by her own judgment, discreetly and most successfully, a large landed and personal property—transacting business with individuals in all situations in life—visiting and visited by

friends near and distant—taking a deep interest and mingling in neighborhood affairs—participating in controversies, both of church and state—executing five different wills, and naming in each of them, by their proper names, upwards of twenty-six blood relations, some of them as distant as grand-nephews and grand-nieces—and yet, in the volume of evidence taken, not one single instance testified to, with any reliable certainty, where she manifested even an inaccuracy of memory. It is true it was argued, that having made no mention in her will of any of the seven children of her deceased sister, Huldah Coe, while all others of her living sisters as well as brothers, and the representatives of such as were deceased, are remembered and referred to, is evidence of a failure of memory, even as to those who were proper objects of her bounty. But the same omission occurs in a will which she executed in 1843, and also in the three intermediate wills between that and the one now propounded for probate. The fact of the omission is accounted for. Her sister, Huldah Coe, left this part of the country more than fifty years ago, and had not been seen by the decedent during that long period; and I believe there is no evidence of her ever having even seen any of Mr. Coe's children, except one of them, Mrs. Bennett. Her declarations to the Rev. Mr. Underwood, that it never was the intention of her husband that Silas Horton should have the place, and that it had never been her intention, though not true in point of fact, is easily explained, I think, in a more plausible manner than by attributing to her any failure of memory in these particulars. As to her showing a want of memory in reference to the extent of her estate at the time she executed the writing in question, I shall have occasion to refer to this fact at another place in this opinion, I will only say here I do not think the evidence justifies the conclusion attempted to be drawn from it.

I will now examine the particular portions of the evidence relied upon as showing the incapacity of Esther Horton at the time she executed this writing. I do not consider it out

of place for me to say, that when this case was presented on the argument, nor since, during a laborious investigation which the importance of the case imposed upon me, has the slightest doubt ever crossed my mind as to the capacity of Mrs. Horton to make a will at the time of the execution of the writing in question. This conviction has not abated nor embarrassed my efforts in endeavoring to arrive at the truth of this case. The unusually protracted investigation in the Orphans Court—the decision of that court refusing probate to the instrument—and the confidence assumed by all counsel on the argument—all had their proper influence in leading me not to rely upon my first impressions. A most careful examination of the whole testimony has, however, but confirmed them.

The Rev. Mr. Underwood was the first witness called by the caveators. He expresses no opinion as to the capacity of the decedent to make a will. The question was not asked him by either party. It may be well to say a word here as to the weight to be attached to the opinions of witnesses on the subject of mental capacity. The abstract opinion of any witness, medical or of any other profession, is not of any importance. No judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinions of witnesses, however numerous or respectable. A man may be of unsound mind, and his whole neighborhood may declare him so. But whether that unsoundness amounts to judicial incapacity for the discharge of the important duty of making a final disposal of his property, is a question which the court must determine upon its own responsibility. It does not depend upon the uncertain or fluctuating opinions of witnesses, but is to be ascertained by the court by the application of certain rules of law in the exercise of a sound discretion regulated by these rules. How many in the community would declare a millerite, or a mormon, or an abolitionist unsound in mind? The opinion of a witness must be brought to the test of facts, that the court may judge what estimate the opinion is entitled to. It is proper and legal to

ask a witness his opinion as to the mental capacity of the individual to discharge the duty in question. He must state the facts upon which his opinion is based. The court will judge of the intelligence of the witness upon the subject to which he testifies, and the proper weight to be given to his opinion from the facts and circumstances upon which he founds his opinion.

Had Mr. Underwood testified to the decedent's incapacity, no reliance could properly have been placed on his judgment. He resided some fifty miles distant from her neighborhood, and had not seen her for ten years prior to November, 1852. He details the circumstances of an interview he had with her in the month last named; and so far from the facts detailed by him having a tendency to bring in question her mental capacity, they show, to any one who has any knowledge of the character of the woman, a mind most remarkably free from the ravages of disease and old age, and with a quickness and shrewdness to accommodate herself to the company she was in, rarely to be found in one in her situation in life. She comprehended at once the object of the visitor. It was ostensibly, and perhaps for the only purpose of speaking to her upon the subject of her religious feelings. Worldly matters were, however, the main topics of conversation, and absorbed all other considerations. When the witness thought proper gently to hint at the judicious arrangement in the disposal of the farm on which she lived, and which he assumed had been made by her, it induced some remarks from her from which the conclusion has been attempted to be drawn that her memory was impaired. She denied warmly that it was ever the intention of her late husband to give the farm to Silas Horton, or that such was ever her own intention. This was not true, either in respect to her late husband or herself. But the further conversation upon the subject, drawn out by the remarks of Mr. Underwood in reply, shows very plainly not that the denial she had made was to be attributed to a decay or failure of memory, but exhibited her fixed determination that she would not be

influenced in the disposition of her property, and that she well understood the neighborhood interest that existed in reference to this subject. I cannot discover, in the interviews Mr. Underwood had with her, the slightest evidence of feebleness of intellect. Her memory did not fail her in any particular, although their conversations embraced a variety of subjects. Distant friends were spoken of, and in her inquiries respecting them she exhibited a strong mind, a memory unimpaired, and good sense. She inquired of the Rev. Mr. Hewson, who resided in Madison, if he was a friend of the Union. The witness asked what she meant, if she meant that he was a friend of the fugitive slave law; that he supposed one might be a friend of the Union, and not be a friend of the fugitive slave law, and presumed that Mr. Hewson was not a friend of the fugitive slave law, but was a friend of the Union. She replied that she did not see how that could be. This opinion was consistent with her well known and uniform political views. She exhibited her pride, her self-conceit, her prejudices. They were all consistent with her natural disposition and character. They showed, in the language of another witness while speaking of her still later in life, *that she was Mrs. Horton still.*

Doct. Samuel Willet was Mrs. Horton's physician the last nine years of her life, and attended her constantly during her last sickness. He is the most important witness in opposition to the will, and his testimony is justly entitled to great consideration. He says the decedent was a woman of good mind—she was blind the last three or four years of her life, the natural effect of which was to make her disposition irritable; her disease would not have that effect, nor was it calculated to disturb her mind; it was chronic bronchitis, which turned to consumption, and terminated in her death. He says that, during the last two or three months of her life, she became more irritable and restless, and that during "her poorly turns" she would be a little delirious *at times.* This he discovered several times—once in particular about the 23d of January. When asked to state how she manifested this de-

lirium, his reply was, that "she appeared, when speaking, to forget the subject she was upon, and spoke on different subjects; her mind appeared to be wandering, wishing to state something, and could not recollect what she wanted to express." Again, he says, "she appeared at all times to be very forgetful—some little derangement every poorly turn—sometimes two or three weeks would intervene. I could not at any time depend upon her answers to questions put to her. On asking Mrs. Horton a question, I would look at the nurse. If Mrs. Horton answered the question correctly, she would signify it by a nod of the head; this was in the latter stage of her case, the principal part of the month of January."

Several significant questions were put to the doctor as to the mental capacity of the decedent, and in order fully to appreciate the answers, it is requisite to have the relative questions and answers in juxta-position. He was asked—Q. From the examination you made of her, as her physician, and from your observation of the effect of her disease upon her, had she or not, in your opinion, at any time after the first of December, A. D. 1851, a sound and disposing mind and memory? A. I could not say, from the examination that I made, that she had a sound mind, and her memory was defective, or deficient, I meant. Q. Had she, or not, in your opinion, sufficient mind and memory to understand the relative situation of her connections, and the general extent and value of her property, during the last two or three months of her life? A. From the questions put, and the answers received, during the months of October and November, her mind and memory were not good, or were more deficient, I ought to have said, than they were three months previous; and in the months of December and January the change of mind and memory had been still more, or was still more deficient. Q. Had the change of mind and memory, in your opinion, during the months of December and January, been such that she could or could not understand the relative situation of her connections, and the general extent and value of her property? A. I should suppose, in her situation, it would be very diffi-

cult for her to recollect all her connections, and to make a correct estimate of her property."

Upon these answers of Doct. Willet no judicial tribunal would be justified in deciding against the general capacity of the decedent to make a will. His testimony is only to the effect, that at times she was delirious; that her mind was unsound and her memory deficient. But it is not a mere unsoundness of mind, or a memory impaired, that constitute that mental incapacity which will deprive a person of disposing of his property. In the rigid examination of Doct. Willet there is no fact stated by him to show that the decedent's mind or memory was *permanently* impaired. It is true there was delirium and a defect of memory, but only *temporary* in their character. In her extreme sickness her mind was wandering, and the only defect of memory which the doctor specifies is, that he could not depend upon her answers to the questions as to her health and pains, ordinarily put by a physician to his patient. No instance of forgetfulness, as to her numerous family connections and friends, or of the neighborhood matters, in which she had manifested a deep interest, and which were the frequent topics of her conversations, is mentioned by the doctor or by any one else. On cross-examination, Doct. Willet says: "this slight delirium that I spoke of was produced by fever or febrile action, and passed off as the fever declined."

But, in addition to all this, Doct. Willet testifies as to the situation of the decedent on the very afternoon that she executed this paper, and proves conclusively that, according to the estimate he made of her character, she was, in the eye of the law, capable of making a will. While Judge Logan was drafting the will, Doct. Willet went in. The decedent had then been up for several hours engaged in preparing and consulting about the paper. When the doctor went in, he said something about intruding. Mrs. Horton said he was not, and asked him to take a chair. He asked her how she was, and felt her pulse. He says, "I did not think she had any fever when I examined her; her pulse was feeble, and

advised her to take wine. I was certain she had no fever when I examined her. I did not discover anything different in her appearance at that time. I did not discover anything like delirium in the few minutes that I was in the room."

I consider Doct. Willet a strong witness in support of Mrs. Horton's capacity, at the time, to make a will. It is true, he says, he considered her insane in reference to certain church matters. If he was right in this, there were many more insane persons in that neighborhood besides Mrs. Horton. But I think I may safely say there is room for two opinions, not only as to whether Mrs. Horton was insane, but whether she was right or wrong in her judgment as to the church difficulties referred to. But I shall have occasion, in another part of the case, to refer to these matters.

Lydia Ann Coleman, another witness against the probate, testifies to several instances to show the unsoundness of mind of the decedent. For the first time, in the fall of the year before decedent's death, she noticed something strange and out of the way, and she details the circumstance as follows: "Last fall was the first that I noticed; we were on a ride to the plains; she wanted that I should stop the horses; I *done* so, and asked her what she wanted; she asked me where I was taking her to; I told her to the plains; she said I was not, that I was taking her in the woods—she said she had one girl drive her in the woods to murder her or to rob her —it was with difficulty that I got her to go any further; she insisted on going back, and sat for some time before I could get her to go any way; she finally concluded to go to the plains. She would repeat over a line out of the bible, and then one out of the hymn book, and in a few minutes she would spell a word, and then put one out for me to spell." The witness mentions two other instances of supposed aberration of mind—one, in which the old lady insisted that a Sharon tree, which had formerly stood by the corner of the house, was a dahlia, and had been destroyed by her nephew and his wife; and the other, in which she insisted that her

nephew had grown so thin as to become a mere skeleto appearance.

Admitting these instances of unsoundness of mind in their force, and without any explanation, they only sl temporary derangements, transitory in their nature, and v far removed from that degree of unsoundness of mind wl will disqualify the individual from the exercise of a testam ary privilege. But in connection with the fact that, i life of more than seventy years, these are the only instar in which similar peculiarities of insanity were exhibited, these before one witness only, they throw no light upon the s ject we are investigating. They look to me more like sal of pleasantry on the part of Mrs. Horton than the evide of her insanity of mind.

Thomas K. Leek saw the decedent on the 26th or 27t December preceding her death. She sent for him to c and see her. She wanted to lease to him her farm on wl she resided. They had considerable conversation toge upon that and other subjects. She said or did nothing wl the witness relates, during the interview, to lead any int gent man to doubt her sanity. The witness, however, s that he made no bargain with her about the farm, bec he did not consider her at that time capable of doing b ness. Upon being cross-examined, the witness admi that immediately after his interview with the old lady, u being asked why he did not take the farm, the reasor gave was that he could not make a satisfactory arrangen about the farm-house. He admits, that in conversing his neighbors upon the subject of the interview, he never g the reason for not taking the farm, now for the first tim leged in his examination. He never expressed his opi to any one of the incapacity of Mrs. Horton at that tim that the interview he had with her excited any such suspi in his mind upon the subject.

Elisha Skillinger, another witness of the caveators, pears to be a man of intelligence, and one whose posi towards Mrs. Horton would afford him some opportunit

forming an opinion as to the state of her mind. Speaking of an interview with her in January preceding her death, he does not venture the opinion that she was not of sufficiently sound mind and memory at that time to make a will. The furthest he is willing to go is to say, that he thought, at the time, that she was not in a condition to reason clearly, and likewise that she was strongly prejudiced. Mr. Skillinger differed with her in church matters. They belonged to different parties in the church. He went to reason with her upon these difficulties, and to disabuse her mind in reference to some of them, in regard to which he supposed she had conceived wrong impressions. After a long and exciting conversation, in which she exhibited much feeling, the judgment of the witness, as to her mental faculties, was that of an intelligent and judicious man—not that she was insane, but that she was greatly prejudiced, and not in a condition to reason clearly. The testimony of this witness is very important. The time he speaks of was two or three days before the decedent signed the writing in dispute. It is the same time at which Lydia Coleman represents her as most feeble in mind and body. The evidence of Mr. Skillinger shows that the great debility of body and weakness of mind, which Lydia Coleman represents Mrs. Horton to have exhibited at this time, must have existed only at intervals. The long and exciting conversation, or controversy it may most properly be called, which Mr. Skillinger refers to as having taken place, was calculated to try the nerves, and the strength both of body and mind. It is impossible that there could have been any permanent decay of memory, and not have exhibited itself then. Matters of an exciting character, running through a period of eight years, were talked over and discussed. Men and their transactions were named and talked about, and yet the witness does not mention or intimate that Mrs. Horton betrayed the least weakness of memory or any evidences of insanity. There is much satisfaction in meeting with a witness like this. His feelings are one way, but he

remembers his responsibility as a witness, and will not permit his judgment to be warped by his partialities.

There were seven other witnesses examined against the will. They are witnesses whose opportunity of judging as to the decedent's capacity was by no means as good as that of the witnesses we have particularly referred to; they state no facts of importance, and I do not think it necessary, therefore, to examine their evidence.

Upon a careful examination of all the evidence offered by the caveators against the probate, I do not think there is a doubt cast upon the general capacity of the decedent to make a will at the time this paper was executed.

The evidence of the witness to the execution of the paper propounded, and that of other witnesses examined to support the decedent's capacity, is most satisfactory and conclusive on the point. Three witnesses were present at the execution of the writing—the three subscribing witnesses, and Judge Logan, one of the two individuals named as executors. Judge Logan was objected to as incompetent when offered as a witness before the Orphans Court. The objection was overruled, and his testimony was taken, and reduced to writing with that of the other witnesses examined. No objection was made to reading his evidence on this appeal; indeed, it was used and relied upon by the appellees to sustain their views of the case. I am not called upon, therefore, to decide whether a person who is named as executor in a will is competent as a general witness to sustain it upon a caveat filed against its admission to probate.

It is hardly necessary for me to advert to the particulars of the testimony of the witnesses upon the subject of capacity. The facts and circumstances they state prove, as clearly as the fact could be established by human testimony, that Esther Horton, at the time she executed the paper, was of sound and disposing mind and memory. There is no way of avoiding the conclusiveness of their testimony upon this subject, except by impeaching it; and that impeachment can only be by charging the witnesses with forgetfulness, inaccura-

being biassed by partiality or prejudice, but must con-
hem of the grossest dishonesty. The counsel met the
oldly, and relied for success upon establishing the dis-
ty of every one of the subscribing witnesses, and of
: Logan, who drew the will.
10 are these witnesses?
lliam Logan and Nathan A. Cooper are men who have
since passed the meridian of life. They have always
ed the confidence of the community in which they lived.
have occupied places of trust under the state govern-
They have, each of them, by a long life of integrity
isefulness, earned for himself a good name. William
1 takes nothing under this will except as executor, and
er Nathan A. Cooper or any of his connections or
ls are directly or indirectly benefited by it. John Van-
and William I. Topping, though men in an humbler
e of life, are of good and honest report. They are all
em now charged, not only with perverting the truth,
f entering into a most dishonest and wanton combina-
And what is charged as the reward of their iniquity?
one of them, the mere gratification of revengeful feel-
for a supposed injury toward one of the objects of the
ent's bounty. As to another, the paltry commissions
executorship; and as to the others, no motive can be
ned.
e general character of these witnesses is not impeached;
is said that the testimony of each of them is inconsist-
nd contradictory in itself, and that, in detailing the par-
rs of the same occurrence, they contradict each other.
e been unable, after a most careful scrutiny of the evi-
given by these witnesses, and of the particulars in which
lleged the contradictions and inconsistencies exist, to de-
nything calculated to excite a suspicion that either of
is not entitled to the most implicit confidence. There
t is true, apparent contradictions; but they are such as
1 the slightest degree impeach the integrity of the wit-
s. Four honest men, in detailing the particulars of a

transaction, which lasted several hours, might naturally be expected to make like variations in their account of what took place. In the leading facts they all agree. In immaterial matters and in the order of occurrences there is some variance. There is enough for criticism, but not enough to excite any surprise that honest, or even accurate men should have made them.

To the question—state what occurred, after you got there —what was said and done by you and Mrs. Horton, as near the order in which it occurred as you can recollect it—Judge Logan replied:

A. When I was about to commence the writing of the will, Mrs. Horton said that she then knew more about what her property was worth than when I wrote a former will for her; then asked me, if I could tell the amount of the inventory that was taken of Mr. Horton's property at the time of his decease; I told her that I could not tell exactly, but that I had an impression that it was about twenty-nine thousand dollars; I said to her, that if she wanted to know the exact amount of that inventory, if Mrs. Stackhouse would open the secretary, I would get the inventory, and know the true amount; I found the inventory, and stated to Mrs. Horton the exact amount; she then said it is as *I, or as we supposed,* I am not certain which she said; she then said that her property was considerably more than she knew it to be when she made her last will and that she should give it to more heirs than were named in her last will; I then asked her who the additional heirs were to be; she told me that there was a lady living in New York that had been, when she was young, much in her family, but that she was now married; that she had always been a particular friend of the family, and she wished to give her five hundred dollars; she said she had a sister residing in York state that she wished to give one hundred dollars—she said her name was Susan McCollum; she said that she had had another sister that was residing in York state, but that she was deceased, and had left children; I asked her how many children that sister left, and what were their names; she said

they were the children of her sister, Rebecca Fordyce; I asked her how many children there were, and what were their names —she told me she did not know how many children there were, nor what were their names, but she believed there were four, and she wished them to have a hundred dollars a-piece; she then directed me to divide four hundred dollars equally between the children of her deceased sister; she then said that she wished to give to each of her brothers one hundred dollars; I asked her whether she wished to increase or diminish any of her former bequests to any of the persons named in her former will; she said she did in the case of Phœbe Robeson, her niece; she said that she was satisfied that she had given her much more than she intended to—that she intended to give her less than she gave her sister, Mrs. Atwood; she was satisfied that the will would give her much more; I asked her if that was the only change that she wanted to make from her other will; she said, give to my other heirs the sums that now is named: I don't recollect of any other particular conversation until I commenced writing the will; there had been nothing said at all in relation to her real estate during this conversation: when I commenced writing the will, and came to that part devising the real estate, I said to Mrs. Horton, I devise this real estate the same as in this will (alluding to a former will that was then lying on the table); she replied no—I think it best not to give the farm to that little girl; that she was a going to give her two thousand dollars in money, but she did not think it was fit for her to have the farm; she then said that she was going to give the farm to the two sons of Mrs. Budd, her niece; I then went on and made the devise, and read it to Mrs. Horton; she says no, it is not right; she says, I only intended to give them this farm, and you have given them all my lands; I then said I was not aware that there was any out-lands; she said there was a lot, and, I think, named the number of acres—I think twelve, lying near Mr. Leek's, that she wished to give Archibald Horton; I then took another sheet of paper, left the one that I was writing on, and commenced and wrote the will that is here; during the

writing of the will, when I had devised the real estate to these two young men, I read it to Mrs. Horton, and she said it was right; I then inquired of her who this out-lot was bounded by, to get some description of it; she said it was bounded by lands, I think, of Nathan A. Cooper and Mr. Leek, and it appears to me she mentioned some other person; Mrs. Horton said it would be a suitable lot for Archibald to build a shop upon; that he had been wanting to get a lot on that street to build upon; she said, however, that she wanted to give it to him and his children; she did not want him to have power to sell it, as there was a person in the neighborhood that wanted to buy it, and she did not want that person to have it; after devising to Archibald as it is in the will, I read it to her; she said that was right, as she wished it to be; I then went on and finished the remaining part of the will, giving the personal property as in the will, but I read it to her in portions several times as I went along, as she would inquire of me what I had said, or what language I had used in certain devises; I then would read to her what I had written; after the will was finished, I then read it to her as a whole (except signing it); Mrs. Horton then requested Judge Cooper to go and get the witnesses that have subscribed the will; some time after they came in (I don't know how long) the will was executed by Mrs. Horton, and I left soon after; I would add, that I took the will home with me, at Mrs. Horton's request—she requested me to do so, and I done it; after the will was executed, I took three former wills, that had been placed in my hands by Mrs. Horton, and placed the wills in the hands of Mrs. Horton; when I placed the wills in the hands of Mrs. Horton, she said, why, I directed you to destroy two of these wills; I told her that I knew she did, but we were alone when she told me so, and that I had taken them home, and had brought them, and they were all there at her disposal; she then told me to throw them upon the fire, and burn them up, and I done so; after they had been upon the fire until they were consumed, she inquired if they were burned; one of the gentlemen in the room replied they were in ashes;

she then said, "now I am satisfied," or well satisfied, I don't recollect which expresion it was; I don't recollect anything that took place there after burning of the will—I think I left immediately; when the gentlemen came in they were evidently very cold, for it was a blustering cold night; as soon as they had warmed a little, Mr. Vandoren and Mr. Topping, I think both, went and shook hands with Mrs. Horton; Mr. Vandoren inquired particularly about her health; she told him that she was much better than she had been; she laughed and said, "Mr. Vandoren, I am about what you might call comfortably sick;" I suppose she then said that she was able to be up through the day, and had a tolerably good appetite, and her cough was not so bad as it had been; she said to him that she was sorry to give him so much trouble in coming there to witness her will, and that she was willing to pay him for the trouble; after some further conversation between Mr. Vandoren and Mr. Topping and Mrs. Horton—the subject of that conversation I don't know what it was—it was some neighborly talk, I think—I supposed they had then got warm—I then took up the will, and laid it on her lap, or her hands, as they lay in her lap—I said to her, here Mrs. Horton is your will that I have read to you, and here are the gentlemen that you have sent for to witness it—are you ready to execute it; she replied yes, but had you not better read it to me again, for it is some time since I heard it; I replied to her that I would, if she so requested, but I supposed the will contained what she would not want to make public; she replied that it did, and that if I was sure I had read it to her as it was, it would be better not to read it again, and that she was ready to execute it: she then said that she could not write her name; I told her that I was aware of that, and that her mark would answer just as well; she then asked me if I would prepare the will for her mark, and steady her hand while she made it; I told her I would, and went to the table and wrote "Esther Horton, her mark," as it now appears in the will; I think I then took a book on which I placed the will, took it to Mrs. Horton with a pen, which I placed in her hand; she

then asked me to guide her hand to where I wanted her to make her mark: I done so, and after she had made her mark, she inquired if it was plain: I told her that it was plain enough: while the will was in that position, I asked Mrs. Horton if she published and declared that to be her last will and testament in the presence of the gentlemen that were there, and if it was her wish that they should subscribe it as witnesses—she replied that it was: she then said, "now I am satisfied, and shall expect you to see my intentions in that will carried out." I will observe, that when Mr. Cooper left for the witnesses, I then took the will and my chair, and sat down by the side of Mrs. Horton: I said to her, Mrs. Horton, you have heard this will read several times, but we are now alone, and I'll read it to you again slow and distinctly, and see if there is no change that you wish made in it: I done so: I read it very slow and very distinctly: when I got through I asked her if there was anything that suggested itself to her mind that she wished changed: she replied no, it was as she wished it: I then asked her if she would not go and lay down, supposing she was tired: she replied no, that she was not tired, and that she had got accustomed to sleeping in her chair: and I advised her to go to sleep, if she could, and I would take a book and read till the witnesses came back: I sat down by the table, and she soon went to sleep, or I supposed she did, and I supposed she slept nearly all the time that Mr. Cooper was gone.

In addition to this, the witness states many other particulars, and gives a great deal of conversation of Mrs. Horton, all confirming the opinion of the witness, that she was at the time of sound disposing mind and memory. No one, perhaps, had so good an opportunity of forming a correct judgment upon this question as he. He had been and was her confidential agent and friend for more than seven years, had drawn three prior wills for her, and was well acquainted with her temper, disposition, and peculiarities.

The testimony of Logan and of the subscribing witnesses is strongly corroborated by facts and circumstances not con-

ed by the caveators. With a brief reference to these facts, all close this part of the case.

his will was not made in a corner; there was not the ıtest concealment about its execution. The business was ısacted under the very roof of the man who is loudest is complaints against it, and whose connection with and rest in the transaction has doubtless occasioned this :roversy. That there had been a change in the old ·'s feelings towards her nephew, Silas Horton, was well erstood in the whole neighborhood. She did not conceal 'om him, or his family, or friends. It was a matter of :itude with them all; and there is enough in the case to w that the change the decedent has made in her will re-:ting her nephew caused no suprise. The reason for this nge was frequently given by the decedent. She said the ily did not treat her well. Whether her complaint was l founded, it is unnecessary to inquire. That she had reason omplain of their neglect is very clear from the evidence. eral days prior to the execution of this paper, she had d the day when the business was to be transacted. Mr. per was to send for Judge Logan, and they were to nd to the business. Before noon, Mr. Cooper drove up ıer door. Jane Crammer, a witness against the will, says was visiting Mrs. Horton; she looked out of her window, saw Mr. Cooper, and told her that Mr. Cooper was :hing his horses; she then said she would want the room herself that afternoon, thus showing her recollection of engagement she had made several days previous, and readiness to enter upon the important duty of her ap-ntment. Soon after the arrival of Mr. Cooper Judge Lo-ı arrived, and these two were occupied there the whole ernoon, engaged all the time in the preparation of this ıer. Doct. Willet found them there engaged in the business ıe seemed to understand its character; expressed no sur-se then or at any other time; found the old lady entirely e from fever or excitement; gave her some stimulant to ace her for the occasion, and then left.

No witness examined ever expressed, and I think I may say with propriety, ever entertained a doubt, until after the death of Mrs. Horton, of her competency to transact her business or to make a will. Her personal property, amounting, as has before been stated, to upwards of $25,000, was in obligations of different amounts against individuals scattered through the country. Her business transactions were necessarily large. She managed them all herself up to the day of her death; she invested her money, and collected the interest, and all her debtors transacted their business with her as a matter of course. Some of them are witnesses in the case. They dealt with her at all times as perfectly competent to transact business, and a single instance is not testified to where the slightest mistake was ever made by her. She was her own receiver and her own paymaster; indeed, in her business transactions she was a most remarkable woman. She kept a day-book of original entries up to within a few days of her death, using such friends to make the entries, from day to day, as happened to be at hand. She, on account of her blindness, was unable herself to make the entries, but they were all made under her own dictation, without the control or advice of any person. The last entries were made in the day-book on the 4th of February, 1852. On that day there are two entries—one of $2, to Doct. Willet, for medical attendance, and the other of $1, for medicines. This was only a day or two before her decease. This day-book shows all the moneys she received, from whom, and on what account, and all her disbursements down to the particulars of payments made for postage. As an instance of her particularity, it was her practice to pay the physician for every visit, as he made it. Doct. Willet says, it was only occasionally that this was neglected, and when it was, the omission was always supplied at the next visit.

In this case there is nothing like *dementia* of old age pretended. Recent impressions and events seem to have had as firm a hold upon her mind as ordinarily with individuals much less advanced in life. Persons and events of early years

were not stamped upon her mind to the exclusion and obliteration of later impressions. Indeed that loss of energy in some of the intellectual operations which is the concomitant of old age was scarcely noticeable in her, and her case, in this respect, is a most remarkable one.

The second objection interposed to admitting the writing to probate is, that the decedent was the subject of *monomania* towards her nephew, Silas Horton.

We have already considered the subject of the general capacity of the decedent, and have reached the conclusion of her general competency. There was no *general* derangement, then, of the intellectual faculties indicating a *mania* rendering the subject incompetent to make a will. Our inquiry must now be limited to the consideration of the proposition, which the caveators have undertaken to establish, that Esther Horton was the subject of a partial derangement of the mental powers affecting her relation to her nephew, Silas Horton, to such a degree as to incapacitate her, in the eye of the law, from making, by will, a final disposition of her property.

In examining this question, it is important that we should consider the connection which existed between Esther and Silas Horton, and ascertain how the fact of Esther Horton's partial derangement, confined to her nephew, can legally affect the disposition of the decedent's estate; for a person may be a monomaniac—the subject of a partial derangement towards a particular individual—and this derangement may be the cause of depriving such individual of the bounty of a testator, which he otherwise would have enjoyed, and yet the will be valid and obnoxious to no principle of law. Instance the case of an individual having two sons, his only heirs-at-law, and a nephew, to whom he is under peculiar moral obligations to leave a liberal portion of his estate. He acknowledges his obligation, and he intends that this nephew shall be an object of his bounty, and shall share with his legal heirs his whole property. He suddenly conceives the notion that this nephew has become a king, or an inheritor of im-

mense wealth, and under this vain delusion he makes his will leaving his whole estate to his sons, to one of them two-thirds and the remaining third to the other, the proportion between the two sons being in no wise affected or having any connection with the delusion towards the nephew. Can the validity of such a will be questioned. *Cui bono?* Not by the nephew. The delusion, it is true, has lost to him a valuable estate: but the interposition of a court, by refusing probate to the will, cannot make him an heir-at-law or a participator in the inheritance. Nor can the son who takes the lesser portion of the estate impeach the will, for the delusion in no way affected the disposition made to him.

In this case, if Esther Horton was under a moral obligation to make her nephew, Silas Horton, a devisee or legatee under her will, but was prevented doing so by an insane delusion which had seized upon her mind, and which was confined to Silas Horton alone, the court will not refuse probate to the will on that account, unless, by doing so, it can restore Silas Horton to a position which he has lost by the intervention of the instrument. Silas Horton is not an heir-at-law of the decedent. The enquiry is therefore a proper one, what interest has Silas Horton in the question: and as to the other executors, did the delusion, if any existed toward Silas Horton, affect in any way the dispositions made by the decedent of her property in respect to them.

Esther Horton was under some obligation to devise the farm which she received by will from her husband to Silas Horton. Her husband had given instructions to the scrivener to draw his will, and to leave the farm to his wife's nephew, Silas. The will was executed agreeable to such instructions. It was agreed, on the particular referred to, upon the solicitations of Esther Horton, and she assured her husband that she would leave the farm to Silas. She intended, until within a few months of her decease, to fulfil this promise. Admitting that she conceived in her mind an unfounded delusion toward Silas, amounting to such a partial derangement of her intellectual faculties as to obliterate all obligation she was under

vards him, and to deprive her of her right reason in every-
ing connected with him, how can this partial derangement
sturb this paper writing as her last will and testament?
las Horton is not one of her heirs-at-law. If this writing is
t admitted to probate, Esther Horton died intestate. There
no other paper offered for probate as her last will. It is
ue she did execute other papers prior to the one in question.
at they were all cancelled. They are not offered for proof;
d this court is bound to decide upon this paper as involv-
g the question as to whether the testator died intestate or
t. There is no other paper that this court can now esta-
ish as the last will of Esther Horton, except the one in
spute. There is no other set up or propounded as her last
ill. It will therefore be of no avail or benefit to Silas Hor-
n for this court to declare that such delusion and de-
ngement as is alleged did exisit. Does any one else show
at such delusion affected his interest in the decedent's
tate?

Susan McCollum, who caveats against this paper, is a
ster of decedent. It is proved that Esther Horton's state
f mind towards Silas has in no manner affected her interest.
he gets by this will, if sustained, $100. By four other wills,
ecuted by the decedent and cancelled, one as early as
43, nothing was given to this sister. Aaron Horton, a
rother and heir-at-law, gets $100 by this will. Nothing
ad been given him by any of the prior wills. Curtiss Coe,
nother heir-at-law, being one of the children of a deceased
ster, who also has filed a *caveat*, takes nothing by this will.
either he, his mother, nor any of the family had been men-
oned in any of the wills of decedent. It is proved, as clearly
s any such fact can be established, that the feelings of Es-
her Horton towards her nephew did not in any manner af-
ect these caveators. I feel perfectly satisfied in coming to the
onclusion, that if the derangement or monomania towards
Silas Horton did exist, as contended for, it is no objection to
dmitting this writing to probate.

But did any such derangement of mind or monomania

pervade the mind of the decedent as would, under any circumstances, have incapacitated her from making a will?

It is important, in investigating such a question, to distinguish between unreasonable and unfounded prejudices and a derangement of mind. In the ejectment suit which turned upon Greenwood's will, Lord Kenyon, in his charge to the jury, to be found in *Curteis' Ecc. Rep. vol.* 3, *appendix*, says —"a multitude of instances there have been where men have taken up prejudices against their nearest and dearest relations; it is the history of every week in the year, and the history of almost every family, at one time or other, that harsh dispositions have been made—that unreasonable prejudices have taken place—that one child, standing equally near in blood has been preferred to another; and if once we get into digressions of that kind, then we get upon a sea without a rudder. Where will you stop? What partiality will be enough to set aside a will? And what partiality will you give way to, and say the will is good? These are questions which the most correct and acute mind that ever addressed himself to the consideration of questions will not be able to settle."

It is alleged that Mrs. Horton was deranged in reference to church matters; that she conceived the notion that Silas Horton was combining with the Rev. Mr. Stoutenburgh, the pastor of the congregational church at Chester, and was squandering certain funds which had been left to the church by her husband; that he and the Rev. Mr. Stoutenburgh were changing the platform, as it is called, of the church, and destroying its usefulness.

Was all this a mere delusion? did it exist only in her imagination, or was there some foundation for the belief she entertained? For, if there were actual ground for suspicion of an injury, though in fact not well founded, and disbelieved by others, the misapprehension of the fact will not be considered mental delusion, and a will made by a party affected by such suspicion may be valid. *Greenwood's case*, 13 *Ves. jun.* 89

3 *Bro. C. C.* 444; *Den* v. *Clark*, 1 *Add.* 274; 3 *Add.* 209; *Heath* v. *Watts*, *Prerog.* 1798, *Deleg.* 1800.

There was a feud in this church, in which Mrs. Horton took a part. The pastor of the congregation insisted that a colored clergyman from Newark should be permitted to preach. To this there was great opposition, and, with many others, Mrs. Horton was greatly excited, and took part against her clergyman. Nathan A. Cooper, who was then the treasurer of the congregation, and Mrs. Horton belonged to the same party. Silas Horton joined the party of the Rev. Mr. Stoutenburgh. The aunt and the nephew thus became estranged. In February, 1851, Nathan A. Cooper was displaced as treasurer, and Silas Horton elected in his place. This widened the breach, and these, with other matters connected with the subject, induced the belief in Mrs. Horton's mind that they were ruining the church. As to squandering the funds, the history of that matter is this, the husband of decedent had, by his will, bequeathed a legacy of $3000 to this church, with instructions "that it should be placed at interest, secured by bond and mortgage on real estate, and the interest thereof appropriated towards the supporting of the preaching of the gospel in said church." When this fund was received, Nathan A. Cooper was elected treasurer, and took charge of the fund. This fund had been infringed upon to the amount of several hundred dollars, and the deficiency had never been made up. When Nathan A. Cooper was turned out as treasurer, and Silas Horton took his place, Mrs. Horton entertained the belief that they were squandering this fund of $3000 left to the church by her husband. Who has a right, under such circumstances, to say that the conviction upon Mrs. Horton's mind in reference to these matters was the evidence of insanity or derangement? Whether her judgment was right, or her conclusion reasonable, is not the question. But is it at all singular that, under the excitement existing in that congregation in reference to these matters, she formed the judgment that she did? Was not the cause adequate to the effect, and cannot the conclusion she arrived

at be accounted for upon the rational operations of the human mind? Without expressing my own opinion as to her judgment of the course taken in reference to the introduction of a colored person into the pulpit, I think I may safely say, if it is evidence of insanity, more than three-fourths of the people of the state could easily be found insane. And as to her judgment upon the use that the trustees were making of the funds of the church, and its consequences, it was no evidence of derangement of mind, unless it can be shown that it is irrational to form or express an opinion unfavorable to a clergyman or an officer of a church. From the evidence before me, I cannot say that Mrs. Horton showed either a want of judgment or of good sense in relation to these church matters.

As to the declaration of Mrs. Horton, that Silas was not a good farmer; that he was suffering the fences on the farm to go to ruin, and other like declarations, they are all accounted for from the fact of the excitement in church matters, and from her feelings toward Silas in consequence of the part he had taken in them. There is nothing in the objection, that Esther Horton, at the time she executed this writing, was the subject of *monomania* towards her nephew, and that the paper offered for probate was the result of such a derangement of mind.

The only further objection to probate is, that the writing was produced by undue influence, and should be rejected on that account.

This influence is alleged to have been exerted by Nathan A. Cooper. He has no interest in the question of the will of the decedent. The motive attributed for the alleged influence is to gratify his malignity towards Silas Horton. Nathan A. Cooper and Silas Horton were opposed to each other in church matters, and the latter supplanted the former as treasurer of the church. From these facts, the *inference* is first to be drawn that Nathan A. Cooper cherished a concealed spirit of revenge against Silas Horton, for there is no evidence to show that they were not on apparently friendly

ms, or that Nathan A. Cooper ever said or did anything
nly that exhibited anything like malice or revenge towards
as Horton.

Such influence, if any was exerted must amount to fraud.
thing less can vitiate the instrument. Facts are relied
on from which it is asked that fraud may be inferred. It
proved that a difference existed between Nathan A. Cooper
d Silas Horton; that Esther Horton was involved in the
ntroversy, and that she took sides with Cooper; that she
d Cooper were on most friendly and intimate terms; that
visited her some four or five times during the three months
mediately preceding the execution of the writing; that
ree days prior to its execution he made her a visit, and an
rangement was then made for the meeting, when the will
as executed; that he was present with Judge Logan and
rs. Horton while the paper was drawn; that he went after
o of the subscribing witnesses, and with them witnessed
e instrument. It is proved that she declared, upon two or
ree occasions, that Cooper furnished her with a copy of
e "negro resolutions," as they are denominated in the evi-
nce, and that he told her that the Rev. Mr. Stoutenburgh
as squandering the church funds. There is no proof that
e at any time consulted with him as to the disposition of
r property, or that he ever advised her to make the dis-
sition of it she did; that he ever spoke to her about Silas
orton in reference to her estate, or unkindly about him in
ference to any other subject. There is no proof that he
er at any time said one word to her that influenced her in
e disposition of her property. Judge Logan testifies that
r. Cooper was there during the whole afternoon while the
ill was being drawn, but that he was not consulted, and that
e did not give any advice, or interfere in any way with the
usiness. There is no evidence to justify the belief that Mr.
ooper exerted any improper influence over Mrs. Horton in
ference to the disposal of her property or the execution
f this paper. He had a right to advise her, if his advice
as asked. He was her friend and neighbor. If he did

at the bar, it is not to be *presumed* that he deceived her, or took an undue advantage of his friendly position. No such inference can fairly be drawn from the facts proved in this case. I feel bound to say, in justification of Mr. Cooper, that there is nothing proved in this case that ought for a moment to shake my confidence in him as an honest man. There is not the slightest ground for the objection to the probate, that the instrument was procured by improper or undue influence exerted by Nathan A. Cooper.

As to the costs, the order made by the court upon the administrator *pendente lite* for the fees of the judge cannot be sustained. By law, the extent of compensation allowed the judges is $50, each, and no larger amount can lawfully be taken out of the estate. If there is any agreement, as the order sets out, entitling them to a larger amount, they must look to the parties who made the agreement. After letters testamentary are issued, the executors must allow to the administrator *pendente lite* no larger amount than $50, each, for the judges. The charge of $20 to the surrogate for reading the depositions is not warranted by law, and is disallowed. In paying the costs and expenses, the appellants and executors must be allowed their expenses, taxed costs, and reasonable counsel fees. The executors must first charge them upon the residuary estate, and make up the deficiency out of the legacies to the caveators. If any further deficiency, the other legacies must abate proportionably.

DAVID I. ANDERSON and others, executors of JOHN ANDERSON, deceased, appellants, *vs.* MARIA BERRY and others, respondents.

An appeal will lie from order of Orphans Court fixing the amount of executor's commissions.

This is a constitutional right, and the legislature has not the power to abridge or take it away.

If the Prerogative Court will not exercise its jurisdiction to review

decision of the Orphans Court in a matter of this kind, except in case of a manifest error in judgment.

Where the amount of commissions allowed the executors is grossly inadequate, it is the duty of the Ordinary to substitute his own judgment, and exercise his own discretion upon the subject matter.

H. A. Williams and *A. S. Pennington*, for appellants.

A. O. Zabriskie, for appellees.

THE ORDINARY. This is an appeal, taken by the executors of the last will, &c., of John Anderson, deceased, from a decree of the Orphans Court of the county of Bergen, in the statement and allowance of their account. The only matter of complaint is as to the allowance of commissions. The executors had previously settled their accounts relating to the general administration of the estate of the testator. In the settlement of that account, commissions were allowed the executors, and with that allowance no dissatisfaction is expressed, and from it no appeal was taken. By the will of John Anderson, the duty was imposed upon the executors of collecting certain rents in the city of New York. As to the collection and disbursements of these rents, the executors very properly make annual settlements with the Orphans Court. In the year 1853, they collected $18,034.13. Out of this amount they paid the taxes, insurance, &c., on the property, a number of small debts owing by the estate, and the balance remains in their hands, to be disposed of to certain legatees named in the will. The court allowed them $360.68 for commissions. The executors complain that this allowance is too small, and the object of this appeal is to have these commissions increased.

The respondents deny the jurisdiction of this court as to the subject matter of the commissions. They insist that, by the statute, the subject of commissions is submitted entirely to the discretion of the Orphans Court, and that this court has no control over that discretion. It is admitted, that if the Orphans Court, in allowing or refusing proper commis-

sions, err in the application of any principle of law, the Prerogative Court may rectify such error; but where the mere question is as to the *quantum* of allowance, it is insisted this court cannot review the determination of the Orphans Court.

By section 4, under article 6 of the constitution, it is declared, "all persons aggrieved, by any order, sentence, or decree of the Orphans Court, may appeal from the same, or from any part thereof, to the Prerogative Court. The object of this provision was to give to the Prerogative Court a review of all orders, sentences, and decrees of the Orphans Court, as well as to matters of fact as of law. It is an *appeal* that is given, that is a review or rehearing upon all determinations or adjudications made by the Orphans Court.

In *Runkle* v. *Gale*, 3 *Halst. Ch. R.* 106, and in *Stevenson's Administrators* v. *Hart's Executors*, *ib.* 473, the point was raised, in both cases, whether this court would entertain an appeal on the simple question of the amount of commissions. The Ordinary, however, merely referred to the question as one raised on the argument, but said it was not necessary for the decision of the case to examine it.

I cannot doubt the jurisdiction of the court. It is conferred by the constitution, and the legislature have not the power if they were so disposed, to take it away or abridge it. The only legislation upon this subject is to be found in the "Statutes of New Jersey," page 214, section 26. This statute was passed April 16th, 1846, when the general revision of the laws took place. It is an exact copy of the law of 1820. This shows it was not passed with any reference to the appeal to the Prerogative Court given by the constitution of 1844. There is nothing in the statute which looks like making the matter of commissions one *exclusively* for the discretion of the Orphans Court. The statute does not confer in terms the power upon the Orphans Court to allow commissions; but taking it for granted that the court, from the very character of its jurisdiction and incidental powers, is necessarily clothed with authority to allow commissions, it fixes or es-

tablishes the principle upon which such allowance shall be made. It declares, that "the allowance of commissions to executors, administrators, guardians, or trustees shall be made with reference to their actual pains, trouble, and risk in settling such estate, rather than in respect to the quantum of estate."

I think there can be no doubt but that this court may entertain an appeal on the simple question of the amount of commissions. It is a right granted by the constitution, which this court cannot deny. Upon such an appeal, the appellant has a right to the judgment of the Ordinary upon the subject matter appealed from.

But although the jurisdiction of this court cannot be denied, yet the principles upon which it will exercise that jurisdiction presents a different question. The amount of commissions is a matter submitted entirely to the discretion of the court, to be regulated and governed upon the principles established by the statute. Where the commissions have been fixed by the Orphans Court this court ought not to disturb their determination, unless they have committed some manifest error of judgment. Where the same facts are before this court as were before the court below, with the same opportunity of judging of the "actual pains, trouble, and risk in settling the estate," and in the judgment of the Ordinary the amount of commissions allowed is grossly inadequate, it is the duty of the Ordinary to substitute his own judgment, and exercise his own discretion upon the subject matter. But, unless there is palpable manifest error, the Ordinary ought not to interfere. The object of the appeal is to afford an aggrieved party the opportunity of having some *error*, by which he is the sufferer, reviewed and corrected by this court. The error should be made manifest.

In this case I cannot say that the Orphans Court erred. The amount of commissions is not grossly inadequate to the services rendered. They are certainly moderate; but on carefully examining all the facts before me, I am unwilling to say that the Orphans Court erred in judgment.

The order of the Orphans Court is affirmed.

ADMINISTRATORS OF STEVENSON, appellants, *and* SIMEON A. PHILLIPS, appellee.

The Orphans Court cannot open the final account of executors or administrators except for fraud or mistake.

Where an account is opened to correct an alleged mistake in any particular item or items, the whole account is not thereby thrown open for review.

S. R. Hamilton, for appellants.

J. P. Stockton and *W. Halsted*, for respondents.

THE ORDINARY. The only dispute between these parti[illegible] now is as to the allowance of commissions. The estate h[illegible] been settled. The respondent, Simeon W. Phillips, is e[illegible] titled, in right of his wife, to the residue of the estate r[illegible] maining after the payment of commissions. The whole [illegible] the residue of the estate is now in the hands of the respo[illegible] dent, except the sum of eighty-three dollars, which is in th[illegible] hands of the appellants.

To determine what the court ought to do in regard t[illegible] these commissions, it is necessary to look briefly at the hi[illegible] tory of the case in this and in the Orphans Court.

In June term, 1850, the final decree of the Orphans Cou[illegible] was reversed by this court. The decree of this court d[illegible] clares, that the account, as stated and passed by the Orphan[illegible] Court, is manifestly erroneous in many respects, and tha[illegible] the same be set aside. It orders the same to be restated, an[illegible] for that purpose refers the same to Caleb S. Green, esq., on[illegible] of the masters.

This order does not correspond with the opinion of th[illegible] Ordinary, to be found in 4 *Halst. Ch. Rep.* 593, but is i[illegible] accordance with a manuscript opinion, which is before m[illegible] which declares that the accounts must be restated and settl[illegible] in this court.

The master restated the accounts, and among other thin[illegible] reported, that in the allowance of commissions, the same a[illegible]

lowance should be made, and in the same proportion as was made by the Orphans Court, at the term of August, 1843, to wit, to the appellants the sum of $461.47, and to the respondent the sum of $577.50.

The master has reported the evidence which has brought him to this conclusion, and upon a review of it, my own judgment corresponds with that of the master.

I think, too, in looking at the proceedings in the Orphans Court, they show a propriety in permitting the commissions to stand according to the first determination of that court in reference to them.

In the term of May, 1843, of the Orphans Court of the county of Hunterdon, the final account was passed, and an allowance was made to the appellants for commissions of $461.47, and to the respondents of $577.50.

In the term of January, 1844, an application was made, by some party interested, to set aside the account for fraud and mistake. No mistake or fraud was specifically pointed out, and yet the court opened the accounts; and the only alteration they made was respecting the commissions. An allowance was made to the appellants of $230.73, instead of $461.47, and an allowance to the respondent of $808.23, instead of $577.50.

Upon *certiorari* to the Supreme Court, the decree of the Orphans Court, opening the accounts and changing the commissions, was reversed, and thus the account was restored as it was in 1843.

After this decision of the Supreme Court, at the term of November, 1847, of the Orphans Court, an application was made to that court to open the account as stated in 1843, on the ground of alleged mistakes in the following particulars —in allowing to the executors the sum of $3000, and also in the distribution of commissions.

The court opened the account, and altered the account as to the allowance of the $3000 in a mere matter of form; and then the court altered the commissions without any proof of a mistake or any mistake being apparent on the

face of the account. They struck out of the account the commissions of $461.47 allowed the appellants, and in place of that sum allowed $361.47, which sum they ordered to be divided between the appellants and respondents, thus giving the appellants the sum of $180.73½ only.

We have, then, the Orphans Court passing a final account, in May term, 1843, allowing the appellants commissions of $461.47. In January, 1844, without any apparent reason, the court change the allowance to $230.73; and when the commissions are restored by the judgment of the Supreme Court to the original sum allowed, then the Orphans Court, upon a mere allegation of mistake as to these accounts, but without such mistake being proved, or being in any way made apparent or probable, the court cut down the commissions of the appellants to $180.73.

The Orphans Court had no right to alter the amount of commissions after the final account had been passed, unless some fraud or mistake was shown with regard to them. And if there was a mistake as to the $3000, and the accounts were opened to correct that mistake, that did not authorize the court to alter the commissions, except so far as their amount depended upon the allowance or disallowance of the $3000. This would be incidental to the variation made in the sum upon which commissions were charged. But it is not pretended that any such principle governed the court. If the $3000 was properly struck from the allowance account, the commissions allowed to the appellants on that amount being only $75, that sum was the proper deduction to be made; and yet they reduce the commissions of the appellants upwards of $280, and deduct nothing from the commissions allowed to the respondent.

The fact is too apparent to be concealed, that the alleged mistake of $3000 was made use of in order to enable the court to reach the matter of commissions. The court is prohibited, by the statute, from opening the account, except for fraud or mistake. But when an account is opened to correct an alleged mistake in any particular item or items, the whole

account is not thereby thrown open for review. The court is confined to the alleged mistake, and to such matters in the account, an alteration of which is incidental to a correction of the mistake.

An allowance of commissions must be made in conformity to the report made by the master.

ANN E. MORRIS and others *vs.* ISAAC P. MORRIS.

It is only when a minor has no other means for his education and maintenance that the Orphans Court is empowered by the statute to order the sale of his lands.

Where the parent is of sufficient ability to maintain and educate the infant, as a general rule, the lands of the latter should not be sold for that purpose.

There may be such a disparity between the fortune of the minor and the pecuniary circumstances of the father as would make it proper that the fortune of the child should contribute to his own support.

The principle which should govern the court in making the order should be the same as has been adopted in chancery in like cases.

H. V. Speer, for appellants.

A. V. Schenck, for respondents.

THE ORDINARY. Ann E. Morris, Mary J. Morris, and George P. Morris are minors under the age of fourteen years. They are seized of about thirty acres of land in the county of Middlesex, valued at one thousand dollars. Their father, Isaac P. Morris, was appointed their guardian by the Orphans Court of the county of Middlesex. He presented a petition to that court, representing that the personal estate and rents and profits of the said real estate were not sufficient for the maintenance and education of the infants, and praying for an order of the court authorizing him to sell the whole of the said tract of land for those purposes. In the investigation before the court, it was admitted, and the admission received as part of the evidence, that the father was seized of

considerable land in the county, and was abundantly able to maintain and educate his children. The court made an order for the sale of the lands, in which order they recited that they had examined the inventory of the estate of the said infants theretofore filed by the said guardian, and had made a full investigation of the situation and produce thereof, and of the state and circumstances of the said infants, and judged it necessary for their maintenance and support to make the order. The appeal is from this order.

By the 6th section of the act respecting "guardians," (*Nix. Dig.* 317) it is enacted, "If the personal estate and rents and profits of the real estate be not sufficient for the maintenance and education of the ward, the Orphans Court of the proper county, on full investigation thereof, may, from time to time, order the guardian to sell so much of the timber growing or being upon the lands of said ward, or such parts of the ward's lands, tenements, hereditaments, and real estate as they shall direct and judge adequate for his or her maintenance and education." By the 10th section of the same act, it is enacted, "If any minor or minors shall become seized or possessed of, or entitled to any real or personal estate in the lifetime of the father of such minor or minors, it shall and may be lawful for the Ordinary, or for the Orphans Court of the county where such minor or minors reside, or such real or personal estate may be, to appoint the father, or other suitable person or persons, guardian or guardians of the estate of such minor or minors."

The provisions contained in the 6th section of the act are of long standing, and were contained in the original acts of the legislature giving jurisdiction to the Orphans Court as to the appointment of guardians and the sale of infants' lands. The provisions of the 10th section are of recent origin, and were probably incorporated into the act in consequence of the decision in the case of *Garrabrant* v. *Sigler*, in April term, 1829, when the Ordinary decided that the Orphans Court had no power to appoint a guardian for a minor during the lifetime of the father; the Prerogative Court had no such

power, nor could the consent of the father confer such jurisdiction.

Previous to the provisions contained in the 10th section, the Orphans Court had no power to order the sale of land of an infant who had a father living. The court could only order such sale upon the application of a guardian appointed by the court. The court having no power to appoint a guardian of an infant who had a father living, it followed that they possessed no power to make such an order. It was to meet this exigency that power was conferred upon the court to appoint the father, or other suitable person, guardian of the estate of such minor. Prior to this power being conferred, the only mode by which the estate of a minor so circumstanced could be appropriated to his maintenance and education was by an application to the Court of Chancery, which, by virtue of its general jurisdiction over minors and their estates, frequently exercised this power. The jurisdiction of the Court of Chancery is not at all diminished or limited by the act of the legislature referred to.

The power conferred upon the Orphans Court was to enable that court to order the sale of the land of a minor where that minor had no other means for his education and maintenance. Although the language of the act is, "if the personal estate and rents and profits of the real estate be not sufficient," it was never the intention of the act that where the infant was abundantly provided *from other resources* for his maintenance and education other than his own personal and real estate, yet because his own real and personal estate were not sufficient for the purpose, the court might order a sale of his real estate. It would be a perversion of the wise provisions of the act to exercise the power in such a case. Suppose a minor seized of real estate, the rents and profits not being sufficient for the objects contemplated by the act, and possessed of no personal estate, but abundantly supplied by wealthy relatives with ample means for support and education, there could be no propriety in ordering his lands converted into money for purposes for which money was not

wanted. It would be a wanton sacrifice of the minor's property, under such circumstances, to order a sale of his lands. It would be using the salutary provisions of the act to the great injury, instead of the benefit of the minor.

In this case it appeared to the court that the parent who, as the guardian, applied for the order was abundantly able to maintain and educate the minors. There was no dispute upon this point. Why, then, should the court make an order to sell the real estate of the minors? The parent was under a moral obligation to maintain and educate his children. The minors had then means other than this real estate to supply their wants, and there was therefore no propriety in making the order in this case.

I do not mean to lay down the principle, that the Orphans Court would not be justified, in any case where the father has the means of educating and maintaining his minor children, to grant an order upon the application of the father, as guardian, to sell the lands of the minor. All I mean to say is, that there should appear to the court some good reason why the father should not appropriate his own fortune and means to maintain and educate his children. There may be such a disparity between the fortune of the minor and the pecuniary circumstances of the father as would make it proper that the fortune of the child should contribute to his own support. The principle which should govern the court in making the order should be the same as has been adopted in chancery upon like applications. *Jackson* v. *Jackson*, 1 *Atk.* 513, 514; *Fawkner* v. *Fawkner*, 1 *Atk.* 405; *Collier* v. *Collier*, 3 *Ves.* 33; *Butler* v. *Butler*, 3 *Atk.* 408; *Andrews* v. *Partington*, 3 *Brown's Ch. Cas.* 60; *Roach* v. *Gawan*, 1 *Ves.* 158; 33 *Car.*; 11 *Vent.* 353, *Anon.*; *Billingsby* v. *Cretcher*, 1 *Brown's Ch. Rep.* 269; *Lady Shaftsbury's case*, 1 *Prec. in Ch.* 558; *Chaplin* v. *Chaplin*, 1 *P. W.* 365; *Shaw* v. *Shaw*, 9 *Ves.* 288; *Hill* v. *Chapman*, 3 *Brown's Ch.* 231; *Wilkes and Wife* v. *Rogers and others*, 6 *Johns.* 571, and cases cited.

EDWARD TURNER and BENJAMIN T. CHEESMAN, executors of the will of Peter Cheesman, deceased, appellants, *and* WILLIAM J. CHEESMAN, respondent.

The presumption of law is in favor of testamentary capacity, and he who insists on the contrary has the burthen of proof, except where insanity in the testator has been shown to exist at a time previous to the execution of the will; in that case the onus is shifted, and the party offering the will is bound to show that it was executed at a lucid interval.

The time of the execution of the will is the material period to which the court must look to ascertain the state of mind of the testator; and although it is competent evidence to show the testator's mind at any time previous or subsequent to the execution of the will, yet such proof is always liable to be overcome, if it be satisfactorily shown that the testator, at the time he executed the writing, had the possession of his faculties.

The testamentary witnesses and their opinions, and the facts they state as occurring at the time, are to be particularly regarded by the court.

The opinion of witnesses, other than the testamentary witnesses, as to the capacity of the testator, are to be received as the slightest kind of evidence, except so far as they are based on facts and occurrences which are detailed before the court.

Old age, failure of memory, and even drunkenness, do not of themselves necessarily take away a testator's capacity; he may be ever so aged, very infirm in body, and in habits of intemperance, and yet, in the eye of the law, possess that sound mind necessary to a disposition of his estate.

The failure of memory is not sufficient to create testamentary incapacity, unless it be total, or extend to his immediate family and property. The amount of mental capacity must be equal to the subject matter with which it has to deal: a man may be competent to make a codicil, changing in two or three particulars the prior dispositions in his will, who would be incompetent to the performance of acts requiring the exercise of far greater intellect and judgment.

If it be clear that the writing propounded for probate is the will of a sound and disposing mind, the court cannot look beyond it for the testator's motives for the disposition of his property made by him. The right of absolute dominion, which every man has over his own property, is sacred and inviolable.—Per POTTS, judge of Orphans Court.

The mere fact of a man's having affixed his signature to a will as a subscribing witness does not entitle his opinion, as to the competency of the testator, to any more weight than that of any one else who may be called upon to testify.

Turner v. Cheesman.

If the subscribing witness is a stranger, and has no opportunity to ascertain and judge of the testator's capacity, his opinion is not entitled to as much weight as that of a friend who saw the testator about the same time, and who was afforded an opportunity of conversing with him, and testing the sanity of his mind.

The opinion of any one—whether a subscribing witness or not—is of but little value, unless he can give the reasons for the opinion which he expresses.

The influence exercised over a testator, which the law regards as undue or illegal, must be such as to destroy his free agency; but no matter how little the influence, if the free agency is destroyed, it vitiates the act which is the result of it.

That degree of influence which deprives a testator of his free agency which is such as he is too weak to resist, and which renders the instrument not his free and unconstrained act, will be sufficient to invalidate it, not in relation to the person alone by whom it is procured, but as all others who are intended to be benefited by the undue influence.

This case came before the court by appeal from the decree of the Orphans Court of the county of Camden. Two papers were presented to the surrogate of that county for probate, the one purporting to be the last will and testament of Peter Cheesman, deceased, and the other a codicil thereto. Caveats against the probate of these papers were filed by William J. Cheesman. Witnesses were examined, and the Orphans Court being divided as to the admission of the codicil, an order was made rejecting it. This appeal was taken from that order. The testimony is sufficiently noted in the opinions delivered to elucidate the points decided.

Carpenter, for appellants.

Voorhees and *Browning*, for respondents.

The following opinion was delivered in the Orphans Court:

Potts, P. J. On the ninth of February, 1853, Peter Cheesman made and executed a will, devising the farm and plantation on which he lived, among other things, to his wife for life, and the residue of his estate, with the farm, after his wife

decease, *equally among his children living* and the representatives of those deceased.

About the 25th of January, 1856, he was attacked with a severe sickness, which terminated his life on the 24th of March following, at the advanced age of nearly eighty-six years.

During his sickness, on the 5th of March, he made and executed a codicil to his will, by which he gave the plantation, in the will devised to his wife for life, *to his youngest son John* after her decease, instead of the share given him by the will, and made two or three other alterations in the disposition of his estate.

Ten of his children survived him or left living representatives—four of them by his first wife, and six by a second.

No question is made as to the will of 1853, nor as to the *fact* of the execution of the codicil of March, 1856, but the caveator insists the codicil ought not to be admitted to probate. They object that the testator was *not of sound and disposing mind* and memory when he executed it; that it makes an *unreasonable disposition of his property;* that it makes a disposition *contrary to all his previous declarations* as to his intentions on the subject, and that it was obtained by *undue influence.*

The general rules and principles adopted by the Ordinary in the case of *Whitenack* v. *Stryker and Vorhees*, 1 *Green's Ch. R.* 11, are of controlling authority in this court as far as they are applicable to this case. They were adopted after solemn argument, and have not since been questioned, as far as I am advised, in this state. In that case the Ordinary said—

1. The first principle is, that the presumption of the law is in favor of capacity, and he who insists on the contrary has the burthen of proof, except where insanity in the testator has been shown to exist at a time previous to the execution of the will; in that case the onus is shifted, and the party offering the will is bound to show that it was executed at a lucid interval.

2. That the time of the execution of the will is the material period to which the court must look to ascertain the state of mind of the testator; that although it is competent evidence to show the testator's mind at any time previous or subsequent to the execution of the will, yet such proof is always liable to be overcome, if it be satisfactorily shown that the testator, at the time he executed the writing, had the possession of his faculties.

3. That of all the witnesses, the testamentary witnesses, and their opinions, and the facts they state as occurring at the time, are to be particularly regarded by the court. They are placed around the testator for the very purpose of attesting, after his death, to the circumstances under which so solemn an instrument is executed.

4. That the opinions of witnesses, other than the testamentary witnesses, as to the capacity of the testator, are to be received as the slightest kind of evidence, except so far as these are based on facts and occurrences which are detailed before the court. Witnesses are to state the facts, and it is the business of the court, from these facts, to pronounce the opinion, upon settled rules and guides, whether the testator is competent or not.

5. That old age, failure of memory, and even drunkenness, do not, of themselves, necessarily take away a testator's capacity. He may be ever so aged, very infirm in body and in habits of intemperance, and yet in the eye of the law possess that sound mind necessary to a disposition of his estate.

The attention of the court, then, is very properly directed, in the first place, to the time of the execution of the codicil and the testimony of the attesting witnesses, to the circumstances attending the execution, and the condition of the testator when he performed the act. It appears that the codicil in question was prepared, under instructions received the day previous from the testator, by Edward Turner, who had also prepared the will of 1853, and who was, by that will, appointed one of the executors, and that said codicil was executed in the presence of Samuel D. Sharp and Jonas Keen;

hat Sharp was the subscribing witness to the will, as well as to he codicil, and that the other subscribing witness to the will, William Taylor, had removed to the western country previous to the execution of the codicil.

Mr. Sharp testifies to the execution of the codicil in due form, and that he believes the testator at the time was of sound mind and competent to dispose of his property; that it was witnessed by him at the request of the testator, and at the testator's own house; and in his cross-examination he says, "Peter Cheesman, at the time he executed his codicil, was in a chair beside his bed; it was in the afternoon, after dinner, about the middle of the afternoon, I think; he said he did not feel well; he got up out of his bed, after I got there, to execute the codicil; I think he either got in bed, or got out of the chair, and sat on the side of the bed after he had executed it; I do not remember now whether anybody helped him up, or back into bed or not; he wrote his name to the paper with his own hand and without assistance—I saw no one assist him do it; John S. Cheesman came after me to witness the execution of the codicil. He says he saw John when he got there—he was cutting up some wood, and was carrying it into the room where the old gentleman was; he asked his father if he could do anything for him, and the old gentleman told him to get in plenty of wood, and keep the house warm; he says the codicil had been written before he got there; it was read over to the old gentleman in my presence—I heard it read to him; Mr. Turner, Mr. Keen, and I sat there talking, perhaps for an hour, before Mr. Turner asked the old gentleman if he was ready to execute the codicil; the old gentleman was lying on the bed when Mr. Turner asked him this; nothing had been said by the old man to me after I got there, except that he asked me how I was, when I went in; I replied that I was well, and asked him how he was, and he replied that he was not very well; he talked to aunt Sallie (his wife), to John and the little girl; I do not know that he talked much to me and

Turner and Keen; he laid upon the bed the whole time I was there, until the time that Mr. Turner asked him if he was ready to sign the codicil; he had his pantaloons on, but I think not his coat; I do not remember that any one helped him get up to his chair; he got up right away after Mr. Turner called him; there was a little stand near the bed; Mr. Turner had a pen and ink of his own with him; after he got up he requested Mr. Turner to read the paper, and aunt Sallie asked him if she must go out of the room; uncle Peter said no, you can stay in; then Mr. Turner read the codicil to him; John S. Cheesman was not in the room at the time; after it was read, Peter Cheesman signed it; so I do not remember that the old gentleman said anything after Mr. Turner was done reading it; Mr. Turner put the pen into the ink, and handed it to Peter Cheesman to sign the paper with, and he did the same thing for me and Mr. Keen." This witness being again examined in chief, says—when Mr. Turner read on down till he came to his son Thomas J. Cheesman to have a certain piece of land of *forty* acres, uncle Peter said, "stop and alter that, and put it *twenty* acres, and if he wants more let him buy it." When Turner read down to John S. Cheesman, Peter said that John had taken the mare to the horse, and should have the colt; he also said that John should have a certain cow. Turner made the alterations as directed.

Mr. Keen, the other subscribing witness, gives much the same account of the transactions, with a little more particularity. He says, when the testator executed the codicil, Mr. Turner requested him to place his finger on the seal, and then asked him if that was the codicil to his will; he said it was; it was read over to him before he signed; that while being read, and Turner had read down to John S. Cheesman he said something about a cow—a black horse and cow were to be his—and told Turner to put the colt in also. When he read to Thomas J. Cheesman forty acres, testator said, "stop I told you twenty, put that twenty—if he wants more let him buy it." Turner interlined it, brought it back, read

what he had written, and said it was right. He says, "I suppose I was in the room with Peter Cheesman an hour before the codicil was executed; he had laid down before we got there, and they wished him to rest; I was in little of a hurry, as it was getting late, and spoke to Mr. Turner to have the business closed; then he spoke to Mrs. Sarah Cheesman about it, and she inquired of the testator whether he had had his nap out; he said he hadn't been asleep—she said she guessed he had; he said no, he had not been asleep, for he had heard us talking; then Turner asked him if he was ready to have the codicil executed, and he said he was; after the codicil was executed I sat down by him—he had then laid down in the bed again; he said to me, 'Jonas, I have been worried about this for fear I should not get it fixed.' He then stated, that having got the codicil fixed, he was satisfied now; he reached his hand over to me, and said, I am now ready to die; he said he was ready to die before, all but that, and as that was now fixed he was ready to go just when it pleased the Lord to take him." As to the testator's competency, the witness says, "I have known Peter Cheesman for many years, and just whatever he made his mind up to he was very decisive and firm; and from the conversation I had with him that day, and a few days before, I thought he had the best mind of any man of his age I had ever known; at the time of the execution of the codicil I thought him a man of sound mind, and competent to dispose of his property; I thought his mind as good as ever it was—I saw no weakness in his mind, it was only in his system."

This evidence, standing alone, would seem to establish quite satisfactorily the testator's competency at the time of the execution. It would appear, from what he said to Mr. Keen, that he had had the matter of making this codicil on his mind, and had been anxious and troubled lest his failing health should have prevented him from accomplishing the purpose. He has it carefully read over to him; he pays strict attention to its contents; he instantly detects an error in the draftsman in giving forty acres of land, instead of

twenty, as he says he told him, to his son Thomas; he orders another alteration to be made in favor of John, and gives the reasons for it; he executes it with due formality, and requests the witnesses to attest it; he says but little, but what he does say is sensible and appropriate to the occasion and to his circumstances. There is nothing in what he says or avers at the time which indicates the slightest failure of mind, memory, or understanding, and the witnesses who saw and heard him, and whose duty it was to be satisfied of his competency before subscribing the instrument, express the most clear and unequivocal opinion that he was possessed of the requisite qualifications.

Then what is the case made by the caveators?

1. They undertake to show the testator's general incompetency, owing to age and sickness, to transact business, both before and after the act of the execution, and from these premises argue his incompetency at the time.

Doct. Sickler, the physician who attended him from the 25th of January to the 8th of February, testifies that he looks upon him as a very old, worn out, broken up man whose mind, as well as his body, had fallen off very much from what it once had been; that his mind was not entirely gone, but when he saw him it was with some difficulty he could bring to his recollection what had transpired a few days before. He did not always recognize the witness when he went there, and on the 29th January does not think he recognized him or anybody else, but next day he did recognize him. He says, when I saw him, I do not think he was competent to transact business; my reason for this opinion is, that I could not get him to carry out my directions, either written or otherwise, in prescribing for him; his disease was hydrothorax, or an accumulation of water in the cavity of the chest.

Doct. Sickler, it will be remembered, ceased attending the testator on the 8th February, and the codicil was executed on the 5th of March, twenty-six days later. On the 7th of March, two days after the codicil was executed, Doct. Clark

was called in to attend him as physician, and continued to visit him until his decease. When he first visited him he says, "I found him lying in his bed suffering a good deal of pain; his pulse was somewhat irregular, and his suffering was principally from some irregularity in regard to his urinal functions; he labored in his breathing from a sense of suffocation; from his symptoms, I supposed there was an effusion upon the chest around the heart, or some organic affection of the heart; his mind, on my first visit, appeared to be perfectly clear—I judged so from his recognizing me and conversing with me about a matter that had occurred a good while before; it had been a long time since I had seen him before, and some fifteen or twenty years since I had previously attended him; he spoke of the circumstances attending my last visit to him as his physician, and of the cause of his illness at that time; he said he hoped I should be able to relieve him, but that he had his doubts about it, as he was an old man, and he then stated to me his age; his disease had no direct connection with his mind, and could not affect his mind directly as fever would; I saw nothing about about his case that would lead me to doubt his competency to make a will." He visited the testator again on the thirteenth and seventeenth of March—conversed with him—should say his intellect was clear. The witness says the severe oppression of which I speak is not constant in such cases; it was not so in his case; it arises from the imperfect oxygenation of the blood, while its circulation is impeded through the lungs; I am willing to say that his disease was one not calculated to affect the mind, or not to have much effect upon the mind.

Taking the evidence of Doctor's Sickler and Clark together, it does not impair the strength of the case made by the attesting witnesses. It is shown that the disease was not calculated directly to affect the mind; that the testator was better two days after the codicil was executed than he had been several weeks before, when Doct. Sickler attended him, and that he did not, at that period nearest the time of the

execution, exhibit anything like a want of intellect or testamentary capacity. The disease was of a character, too, which explains a good deal of the testimony in the case, such as his indisposition at times to converse or to use any exertion. The painful sense of suffocation incident to the imperfect oxygenation of the blood, from the failure of the lungs to perform one of their most important functions, would naturally dispose the patient to avoid effort and excitement, and desire as perfect and undisturbed quiet as possible. Doct. Sickler says the disease of the testator was chronic. Treating of hydrothorax, Doct. Wood says, "sometimes it comes on suddenly, and proves fatal in a short time; but much oftener it is chronic, lasting for a long time, sometimes better sometimes worse, now yeilding to treatment and again returning, until at length the patient succumbs, either under the disease in which the dropsy originated or from the effects of the dropsy itself." 2 *Wood's Pr. of Med.* 356.

Thus far we have examined the testimony of those witnesses whose *opinions* are entitled to any considerable weight in determining the question of the testator's capacity. A number of other witnesses have been examined; as to these, their opinions, in the language of Mr. Justice Washington, *Harrison* v. *Rowan*, 3 *Wash. C. C. R.* 587, are entitled to little or no regard, unless they are supported by good reasons founded on facts which warrant them. If the reasons are frivolous or inconclusive the opinion of the witnesses are worth nothing, and neither facts nor opinions are of any weight in investigations like this, except so far as they tend to throw light on the condition of the testator's mind *at the time* of the execution of the codicil. I shall therefore only have occasion to notice the testimony of such witnesses as state facts in support of the opinion they express.

Thomas Pilling says he did business with testator in October or November, 1855, and he appeared to be competent then to attend to business as he had ever been—witness knew him first in 1849.

Jacob Johnson knew testator for three years, was with him

a good deal during his last illness, sat up with him several nights; part of the time he appeared rational and part of the time appeared to know nothing, and talked strange. One evening, about four weeks before he died, I was there; he talked very strangely; he called to his wife, and wanted her to get up and wait on him; she told him she could not wait on herself—she was utterly unable to get up; he wanted to know what ailed her, and she told him that he knew that she was lame; then he began calling for his son John, but she insisted he should let him alone, as he had had no sleep for several nights; he then commenced calling for me—I was standing in the room at the time; I told him I was up—but he kept on calling for me, and told me to get wide awake, that he wanted to talk to me; I put my hand on his shoulder, and told him I was there, but he still kept calling for me two or three minutes—this was before the 4th of March. Witness says he was there three or four times even after that—sometimes staid part of the evening, and sometimes all night; sometimes testator remained pretty quiet, and continued so all the evening, at other times he would call for John and others, and when they would come to him he did not want anything; if he was uneasy, he was raving in the way I have stated. The witness says, before he was so sick as to require sitting up with, he did not notice anything of his being out of his mind.

William C. Garwood, who was a son-in-law, visited the testator but three times during his last sickness. The first time he appeared to be very low, the second, to have his proper mind as much as could be expected for a man of his age and so sick as he was. The second time was on the 24th of February; he was then quite low, did not talk or take notice, but knew the witness, and answered a question or two rationally. The last visit was eight or ten days before his death, and the testator was then quite low, and did not recognize the witness. These visits were made, it will be perceived, the second more than a week before, and the third one over a week after the codicil was executed.

Several other witnesses were examined, who visited him more or less frequently during his sickness, and sometimes sat up with him.

Taking all the testimony upon this subject together, it exhibits nothing that might not naturally have been expected in the mental and physical condition of a patient gradually sinking under the effect of a painful but fluctuating disease. Sometimes he would take little or no notice of those about him, sometimes he appeared restless and his mind particularly affected, sometimes he was better, and then his mental powers recovered their tone. Nothing indicating *permanent* alienation or derangement of intellect is shown, and the whole testimony is perfectly consistent with the fact, sworn to by the attesting witness, that on the 5th of March, at the time the codicil was executed, his testamentary capacity was equal to the occasion for which it was called into exercise. The witnesses who speak of his situation on the night of the eighth of March, John Zane and Harrison Cheesman, gave very much the same testimony as Jacob Johnson; and there is nothing in their evidence which renders it either impossible or improbable that, in the afternoon of the 5th, he was of sound and disposing mind and memory. Andrew J. Ware a grandson, saw him on the 4th, but the old gentleman did not recognize him, and when told who it was, said, "how are you Jacob?"

Ann Hurff saw him between seven and eight o'clock on the evening of the 5th, after the codicil was executed; she says he did not know her; that two of his grandchildren, Amanda and Rebecca Cheesman, were there, and he did not know them; Mrs. Hurff went to his bed, and asked him how he was, and he said, I do not know you; I told him who I was, and he made no reply. The grandchild went to his bed, and precisely the same scene is acted over again. Charles Billings and the girl Emmeline, who say they saw him on the 5th, and the latter waited on him, speak of his not knowing people, not speaking, not appearing to know anything. But testimony of this character amounts to very little when oppo-

to the positive evidence of the attesting witnesses. A sick man laboring under a physical disease, which exertion of any kind aggravated, and exposed constantly to visits and addresses which tended to disquiet, and probably discomfort him, may have declined the recognition of visitors for the very purpose of avoiding the necessity of conversation. It is remarkable that, though some of the witnesses express opinions that he was out of his mind, drawn chiefly from his silence, there was no one who testifies to any conduct or conversation on his part which shows decided mental alienation.

Instances are, it is true, detailed which show that his memory of recent transactions was sometimes at fault; but this is incident to old age. It does not appear but that at all times, when able to converse at all, he perfectly understood and comprehended the nature and extent of his property and the circumstances and relations of the objects of his bounty.

It is in evidence, too, that the disposition he made of his homestead farm, in the codicil of the 5th of March, was different from that which he had often before indicated as his intention. But this alone is no evidence of imbecility. Men of sane mind, young as well as old, in health as well as in sickness, often do this. He may have had good reasons for what he did. The preference in this case was of his youngest son, who had always lived with him. To most, if not all the elder children, he seems to have made advances in his lifetime, and so far as the case is before this court, it is not clear that the final disposition of his estate was to any great extent unequal; for it is by no means certain that the devise of the homestead farm embraced any of the new land, and unless it did, the inequality is not very great.

No importance at all is to be attached to the mere opinion of witnesses who are interested in breaking the codicil, and very little to the testimony as to the declarations of Turner, the executor. The caveators could have called him as a witness, and declined to do so, and this fact, taken in connection with the questionable character of the evidence as to what he said, detracts very much from its weight.

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time of the commencement of his last sickness, the te
had capacity enough to make a will, certainly no previo
or word of his is shown that ought to create a doubt ab
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ance of acts requiring the exercise of far greater i
and judgment. *Vanalstine* v. *Hunter*, 5 *Johns. Ch.* 1
Harrison v. *Rowan*, 3 *Wash. C. C. R.* 580.

Or, as was said by Washington, J., in *Stevens* v. *V*
4 *Wash. C. C. R.* 267, "He must, in the language of t
be of sound and disposing mind and memory. He mu
memory. A man in whom this faculty is totally

guished cannot be said to possess understanding to any degree whatever or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease. He may not be able at all times to recollect the name, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this, had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed his will?"

Great stress has been laid upon the inequality in the disposition of the testator's estate, as created by the codicil; and the evidence that the testator had previously, on several occasions, expressed an intention to devise his estate equally among his children. If we are clear that this is the testator's codicil, and expresses the will of a sound and disposing mind, we cannot look beyond it for his reasons or his motives for doing what he did. The right of absolute dominion which every man has over his own property is sacred and inviolable. The argument is only legitimately applicable so far as it affects the question of the testator's capacity at the time.

But the force of the argument itself depends chiefly on

the construction which the caveators put on the language of the clause in the codicil devising the homestead farm to John. They contend that it embraces a real estate worth some $22,500, while the proponents of the codicil construe it as only conveying the cleared arable land, worth some $5000. If the latter construction be the true one, the inequality, as before observed, is not so great as to cause surprise. It was in favor of the youngest son, for whom no previous provision had been made, who had always lived at home, and was under age and unmarried. The other children seemed all to have been settled, and several of them, at least, had had advances of land. Then, as to the testator's previous declarations of his intentions to divide his property equally, I have already referred to the fact, that he expressed himself at the time he executed the codicil, or immediately after, as having for some time contemplated the change in question, and having been anxious and troubled lest he should not have lived to make it.

Upon the whole case, I am clearly of the opinion that the caveators have failed to show want of capacity to execute the codicil on the 5th of March, and that it ought to be admitted to probate.

THE ORDINARY. On the 9th of February, 1853, Peter Cheesman executed a writing as his last will and testament. On the 4th of March, 1856, he executed a paper, purporting to be a codicil to his will of February, 1853. On the 25th of March, 1856, he died. The above instruments of writing were offered for probate to the surrogate of the county of Camden. To the proof of the will dated February, 1853, no objection was made. The respondent filed a caveat against probate of the codicil. After investigation before the Orphans Court of the county of Camden, the judges being equally divided as to the admission of the codicil to probate, an order was made rejecting it. This is an appeal from that order. After a careful examination of the evidence, I think the order made

by the Orphans Court was erroneous, and that the codicil should have been admitted to probate.

By the will of 1856, the decedent devised his homestead farm to his wife during her life, and at her death to be equally divided among his children. By the codicil, he devises his homestead farm, after the death of his wife, to his son, John S. Cheesman. This is the only material difference made by the codicil, and has given rise to this controversy.

The grounds of objection made to admitting the codicil to probate are two—first, that the testator, at the time of its execution, was not of sound and disposing mind and memory; and—second, that while his mind was debilitated and distracted by the disease under which he was suffering, his two sons, Benjamin and John, took advantage of the testator's situation, and by exerting an undue influence, induced the execution of the codicil.

On the 25th of January, 1856, the testator was taken ill of the sickness of which he died. It was a chronic affection, designated by the physicians *hydro thorax*, or an accumulation of water in the cavity of the chest. The disease is one fluctuating in its character; but in the case of the testator was so violent as, upon a man of his age, to leave no hope of a permanent cure. He was about eighty-five years old at the time of his death.

There certainly is nothing in the evidence to justify the entertainment of a doubt as to the entire competency of the testator to make a will prior to his last sicknes. Our inquiry, therefore, is confined to a very limited period—that intervening between the 25th of January, 1856, and the 25th of March following, which was the day of the testator's death. It was in this interval of time that the codicil was executed.

I think this is one of those cases which must depend very much upon the testimony of the subscribing witnesses—and for this reason; there is no pretence, or at any rate no evidence, to justify taking the ground that there was any permanent continued derangement or prostration of mind, such as would render the testator incompetent to make his

will. *Jacob Johnson*, one of the strongest witnesses for the *caveat*, and upon whom the respondent places much reliance, says, he was with the testator a good deal during his last sickness, and sat up with him several nights—*part of the time he appeared to be rational*, and part of the time appeared to know nothing. He further says, before he was so sick as to require sitting up with, I did not notice anything of his being out of his mind.—*William C. Garwood*, the son-in-law of the testator, a witness for the *caveat*, says, when he saw the testator, six weeks before his death, he seemed to have his proper mind as much as could be expected for a man of his age, and as sick as he was.—*John Lane* says, he could not say the old man was right all the time, or wrong all the time. This is a fair specimen of the evidence of the witnesses who were sworn in support of the *caveat*. Most of the witnesses examined on behalf of the caveator have their feelings enlisted in this controversy. They are nearly connected with the family, and certainly feel a desire to defeat the codicil. I am doing, and intend them no injustice in saying this; for I could not fail to notice in this case, in reference to, I think, all the witnesses who were in a position to feel an interest in the controversy, that they did not deny nor attempt to conceal upon which side their feelings were enlisted. I place more reliance upon their evidence for their candor in this particular.

What was the state of mind of the testator on the 5th of March, 1856, the date of the codicil? The will of 1856 was drawn by Edward Turner, and he also drew the codicil. Mr. Turner's character for probity and as a man of intelligence is not questioned. He was named as one of the executors in the original will. He is in no way interested in the question that has arisen as to the codicil. Whatever may be the issue as to it, his executorship is not affected. He does not appear to have taken any part in this controversy, and has not manifested any interest in favor of any of the parties. He has not been examined as a witness; but it is something in favor of the validity of the codicil, that it was drawn by him. As

he was well acquainted with the testator, and possessed his confidence, and was intrusted by him to draw and execute his will, we cannot suppose that he would have drawn a codicil, and have permitted the testator to have executed it at a time when he was not competent to dispose of his property. We have the fact that, on the day before the will was executed, Mr. Turner went to the testator's house, and received his instructions as to drawing the codicil. What transpired at the time, or who was present when the instructions were given, if any one besides Mr. Turner, there is no witness who testifies. The fact of the testator having himself given instructions to Turner appears from a remark made at the time of the execution of the codicil. When Mr. Turner, in reading the will, read *forty* acres, the old man interrupted him, and said, "I told you *twenty*."

The witnesses to the codicil are Samuel D. Sharp and Joseph Kean. We have the opinion of both of them, that at the time of the execution of the codicil the testator was competent. They detail all the circumstances that took place at the time; and, as related by them, what then transpired would seem fully to justify the opinion they formed as to his competency. The mere fact of a man's having affixed his signature to a will as a subscribing witness does not, it appears to me, of itself entitle his opinion, as to the competency of the testator, to any more weight than that of any one else who may be called upon testify. If the subscribing witness is a stranger, which is sometimes the case, called upon to meet the exigency of the moment, and having no opportunity in a sick chamber to ascertain and judge of a man's capacity, his opinion is not certainly entitled to as much weight as that of a friend who saw the testator about the same time, and who was afforded an opportunity of conversing with him and testing the sanity of his mind. The opinion of a subscribing witness is entitled to weight from the same consideration as that of any other man who is not a subscribing witness. The means which he enjoys of forming a correct opinion gives weight to his opinion. The opin-

ion of any one—whether a subscribing witness or not- but of little value, unless he can give us the reasons for opinion he expresses, and can show that he had an opp tunity to justify him in forming the opinion he expresses. the subscribing witnesses are acquaintances and friend the testator, familiar with his peculiarities; and if, adde this, they are men of intelligence, and at the time w afforded an opportunity of judging of the testator's stat mind, their opinion would be entitled to very great and c trolling consideration. It is often said that subscribing nesses are those called by the testator himself to attes his capacity; and that, on this account, the law atta great weight to their opinion. But it most frequently h pens that a testator gives it very little thought as to are the witnesses of his will, and in fact has nothing t with selecting them, but leaves it altogether to the scriv who draws his will. An individual, called into a sick ch ber to witness the will of an invalid, would be thought titute of good breeding and impertinent should he propo any question for the purpose of testing the sanity of the whose will he is called upon to attest. Such an occasi regarded as a mere business one, and is despatched little ceremony, and most frequently without any oppo nity being afforded of judging of the state of mind of man who executes the instrument. Whether a subscri witness or not, we must look at the intelligence of the and the means he enjoyed of forming the opinion whi advances, and give weight to his opinion accordingly.

In this case both the witnesses were friends of the tes of long standing, and they had the opportunity afforded of ascertaining the state of mind of the testator at the of the transaction of which they testify. Mrs. Chees the wife of the testator, and Mr. Turner, the scrivener, present with the witnesses, and they all saw the will exec It was not done in haste, but in a manner and under cir stances that afforded a full opportunity of judging wh the testator at that time understood the business he

transacting, and was capable of performing it. *Samuel D. Sharp* was a subscribing witness to the will to which this was a codicil. He was therefore a very suitable person to be called upon as a witness to this instrument. The testator recognized the witnesses, and conversed with them. He gave directions to his son to get in wood, and keep the house warm. The codicil was read over to him. His wife asked him if she should go out of the room. He answered, "no, you can stay in." The testator stopped Mr. Turner twice while he was reading the codicil, and had alterations made, and gave his reasons for the alterations, and in both instances gave evidence of memory and understanding. After the alterations were read over to him, he said they were right.

After the execution of the codicil, the witness, James Kean, sat by the bedside, and conversed with the testator. He said, addressing the witness, "Jonas, I have been worried about this, for fear I could not get it fixed." He then stated that, having the codicil fixed, he was satisfied. He reached his hand over to the witness, and said, "I am now ready to die; I was ready before—all but that." The witness says he had been acquainted with the testator for twenty years; that he was a man of decision and firmness; and from the conversation he had with him that day, and a few days before, he thought he had the best mind of any man of his age he had ever known.

We have here the testimony of three intelligent and disinterested witnesses in favor of the competency of the testator at the time the codicil was executed. Although Mr. Turner was not examined as a witness, the position he occupies towards all the parties—the fact of his receiving the instructions as to the codicil the day before its execution, and his presence at the time superintending its execution—is testimony as strong in favor of the testator's competency as if he had given direct evidence to that effect as a witness upon the stand. In corroboration of these witnesses, we have the testimony of Doct. Clarke. From the 8th of February to the 7th of March, the testator had no attending physician. Doct. Clarke was called in, and visited him for the first time on

the 7th of March, and attended him as his physician to the time of the testator's death. He testifies that at his first visit the testator's mind was perfectly clear; that his disease had no direct connection with his mind, and would not affect his mind directly as fever would; that he saw nothing about his case which would lead him to doubt his competency to make a will; that on the 13th of March, when he next visited him, he found him pretty much the same as at his first visit, and so again at his next visit on the 17th of the same month; that on the 20th he was worse; on the 23d he was insensible; on the 24th he died. He explains the characteristics of the disease, which explanation reconciles the testimony of the witnesses, who declare that at the times they saw him he was incompetent to make a will, with the testimony of the subscribing witnesses, that when he executed the codicil he was competent. It appears to me that there is nothing in the evidence which has been adduced on the part of the caveator to invalidate the evidence of the subscribing witnesses, and that it is proved, beyond any reasonable doubt, that the testator, at the time he executed the codicil, was of sufficient sound mind, memory, and understanding to dispose of his property by will.

As to the other objection against admitting the codicil to probate—that the codicil was induced by undue influence—I do not think there is any evidence to justify the charge. There is no evidence that Benjamin or John ever, at any time, had any conversation with their father about making his will. The facts that Benjamin once said he was going to try to make his father give John the homestead; that when it was alleged his father was out of his mind John denied it; that John lived with his father, and was kind and attentive to him; that he went after the witnesses to attest the will; that John said his father was going to make his will in February, 1853, (which was the time the first will was executed) and that Edward Turner was coming up for the purpose; that Benjamin wanted the old man to sell his timber to pay his debts, and influenced him in reference to the manageme

his property—these are all the facts, or the principal ones, lied upon to show undue influence. They amount to thing in establishing the allegation, that the codicil in estion was the result of undue influence, exerted either by hn or Benjamin over their father. Such are not the in- ences which the law regards as undue or illegal. The in- ence must be such as to destroy the free agency of the n over whom it is exerted, whether threats of bodily harm unceasing importunities to a man on his death bed, or by of unkindness, when the subject of it is in the power and the mercy of another; if the individual occupies a position vards another, dependent upon him for their little atten- ns and conveniences, which alone make life supportable, that he cannot say *no* to a mere request that is made of n; no matter how little the influence, if the free agency is stroyed, it vitiates the act which is the result of it. "A tator should enjoy full liberty and freedom in the making his will, and possess the power to withstand all contradic- n and control. That degree, therefore, of importunity or due influence which deprives a testator of his free agency, ich is such as he is too weak to resist, and will render instrument not his free and unconstrained act, is suffi- nt to invalidate it, not in relation to the person alone whom it is so procured, but as to all others who are in- ded to be benefited by the undue influence." 5 *Gill & hns.* 302. In this case there is no proof at all of either hn's or Benjamin's attempting in any way, by word or ed, to exert any influence over their father in reference to e disposition of his property.

It was proved that the old man repeatedly declared that was his intention to divide his property equally among s children. This evidence was objected to. The evidence competent. Where the sanity of the testator is in ques- on, and where undue influence is sought to be established, is competent to give in evidence the declarations of the cedent to show that the disposition of his property by the riting which is propounded for probate is in opposition to

his intention, as manifested by his repeated declarations upon the subject. The declarations in this case amount to nothing. If the codicil had not been made, the disposition of the testator's property, by the will of February, 1853, was as inconsistent with his repeated declarations, as proved, as is the disposition made of his property by this codicil. All his children had been advanced from time to time in real estate, except his son John; and whether John gets more by the codicil than some of the other children received by advancements, is a matter of doubt and dispute.

I think that the competency of the testator is established, and that the allegation of undue influence is not proved. The codicil was executed with all the formalities required by law, and is entitled to be admitted to probate.

GARRET GARRISON, appellant, *and* EXECUTORS OF PETER GARRISON'S WILL, respondents. A.

On a question of testamentary capacity, evidence of the opinions of wit-
nesses, though competent, is merely preliminary to the further inqu
of the facts and circumstances upon which their opinions are formed.

It is not the *opinion* of the witness upon which the court relies, but
court draws its own conclusion, and forms its own judgment from t
premises which have produced the conviction in the mind of the witne

The mere opinion of a subscribing witness is entitled to no more weig
with the court than that of any other witness.

The opinion of a witness who is a stranger to the testator, and who sees
hears nothing except what is necessary to enable him to attest the i
strument as a subscribing witness, is not as much to be relied upon
that of a neighbor and familiar acquaintance of the testator. The opi
ion of neither is of any weight with the court, except as it proves its
to be a correct and sound conclusion from facts which justify and wa
rant it.

A man who will subscribe an instrument attesting that the testator is
sound mind, memory, and understanding, and then repudiate under oa
his own attestation, does not occupy a position that will justify a co
in giving any weight to his own opinion.

A. B. Woodruff and *W. Pennington*, for appellant.

D. Barcalow and *A. O. Zabriskie*, for respondents.

THE ORDINARY. This writing was propounded for probate, as the last will and testament of Peter A. Garrison, deceased, to the surrogate of the county of Bergen. A *caveat* was put in against proving it. A protracted investigation was had before the Orphans Court of the county, and that court unanimously admitted the will to probate. The caveators have appealed from this order of the Orphans Court to this court.

There are two objections made to the admission of the will to probate.

First. That the decedent had not sufficient mental capacity, at the time the paper was executed, to make a will.

Second. That either in consequence of fraud, mistake, or some circumstance beyond the decedent's control, the contents of the writing are not such as he intended they should be, and that therefore the writing is not the decedent's *will.*

This will was executed on the 26th of June, 1854. The decedent died, on the 23d day of July following, at the age of sixty-three or four years. The disease which caused his death was consumption, produced by the excessive use of ardent spirits.

As to the evidence of the general capacity of the testator for the ordinary business of life, we have the following facts, which are not controverted. He was the owner of a large farm, which he inherited from his father, in the county of Bergen, and another farm, of some hundred acres, adjoining the same, which he had acquired himself. He carried on the business of farming for some thirty-five years immediately preceding his death. He was the overseer of his own farm, and superintended and carried it on without the agency or aid of any one else. Most of the time his family consisted of several members. He was always the head of his family, and, as such, was always regarded and respected by its in-

mates. He bought and sold both real and personal estate, made his own bargains, executed papers, kept his own accounts, invested his money and received the interest, and transacted all business appertaining to the management of his property and his domestic affairs without even the friendly advice or interference of any one. During all this time there is no evidence of his ever having even once made, or of his having proposed to make an improvident bargain, or of committing a mistake of the most trivial kind in all these various transactions from which the inference could be deduced that he was not perfectly competent to their transaction. This superintendence and management of his affairs continued to the day of his death; and there is nothing in the case to show that any one, during his life, except one single individual, and he a mere passing acquaintance, expressed the opinion that he was not fully competent to manage his own affairs. And yet many respectable witnesses testify that, during the few months preceding his death, and more particularly about the time of the execution of this will, he was not of sufficient mental capacity to transact business, and to dispose, by last will and testament, of that property which he was from day to day managing with prudence and judgment. It is my duty, therefore, to look at the facts upon which such opinions are based, and to determine whether they justify the conclusion to which the witnesses have arrived. The very best evidence of a man's capacity to dispose of his property by last will and testament is the fact of his management and disposition of it, in every other respect, with prudence and judgment. It is difficult to conceive how it is possible for a man to have the sole control of his property, to buy and sell with judgment, and to dispose of the proceeds judiciously, and yet deny to him the capacity of saying how his property shall be disposed of when death deprives him of his personal control over it. The capability of the testator to discharge the duties of a public situation affords a strong presumption of his capacity to make a will. *White* v. *Wilson*, 13 *Ves.* 87.

On both sides witnesses have been required to give their opinions as to the capacity of the testator. This evidence is competent; it is merely preliminary to the further inquiry of the facts and circumstances upon which these opinions are formed. It is not the *opinion* of the witness upon which the court relies, but the court draws its own conclusion and forms its own judgment from the premises which have produced the conviction in the mind of the witness. The mere opinion of a subscribing witness is entitled to no more weight with the court than that of any other witness. It is true he is called upon by the testator, as his witness of the execution of the instrument and of his competency to make a will, and the theory is, that "the attesting witnesses to a will are regarded in the law as placed around the testator in order that no fraud may be practised upon him in the execution of the will, and to ascertain and judge of his capacity." 1 *Jarman* 73. Our experience in these matters is sufficient to satisfy us that the subscribing witnesses seldom if ever take any pains to *ascertain* the capacity of the testator, and are generally those who know least of his general character and disposition or of his mental capacity. As a general thing, very little regard is paid by the testator to the character of the individuals who are called upon as the attesting witnesses to this most solemn and important act. Their duty is discharged by their formal attestation of the instrument; and any effort on their part to ascertain the state of mind of the testator, or the fact, whether he was the dupe of others who were more active in the transaction, and upon whom the testator was reposing his confidence, would be regarded as inquisitive, and as an unwarrantable interference with matters which did not concern them. The opinion of a witness who is a stranger to the testator, and who sees or hears nothing except what is necessary to enable him to attest the instrument as a subscribing witness, is not as much to be relied upon as that of a neighbor and familiar acquaintance of the testator. The truth is, the opinion of neither is of any weight with the court, except as it proves itself to be a cor-

rect and sound conclusion from facts which justify and warrant it. A man who will subscribe an instrument attesting that the testator is of sound mind, memory, and understanding, and then repudiate under oath his own attestation, does not occupy a position that will justify a court in giving any weight to his mere opinion. A will may be sustained although all the subscribing witnesses depose to the incapacity of the deceased. *Le Breton* v. *Fletcher*, 2 *Hagg.* 568 = *Lowe* v. *Jolliffe*, 1 *Sir Wm. Bl.* 365; *Shelford on Lunacy* 54, 55. And it is a frequent occurrence for a will to be refused probate, notwithstanding the strongest kind of testimony in support of the mental capacity of the decedent. I have thought proper to say more, as to the weight to be given to the evidence of a subscribing witness, than perhaps is called for by this particular case. But in several cases, lately argued before this court, an undue weight, it seemed to me, was attached to the opinions of subscribing witnesses, and an idea seemed to prevail that a court ought not to scrutinize as closely the facts from which such witnesses formed their opinions as those which were the base upon which the opinions of other witnesses rested. The observation of Swinburn is applicable to all witnesses—whether attesting or otherwise—"it is not sufficient for a witness to depose that the testator was mad or beside his wits, unless a sufficient reason can be given to prove this deposition, as that he saw him do such acts, or heard him speak such words, as a person having reason would not have done or spoken." *Swinburn* 72.

Let us examine with some particularity the testimony, in order to extract from it the facts and circumstances from which a conclusion is drawn unfavorable to the testamentary capacity of the decedent. I will take the witnesses upon whom the caveators mainly rely in resisting the proof of the will.

Cornelius H. Van Houten expresses the opinion that the testator was incompetent for business—that his faculties were pretty well destroyed—that his mind was gone. The witness

says he never had any business transaction with the deceased, and that his acquaintance with him was "a mere street or passing acquaintance." The foundation for this witness' unfavorable opinion was what occurred at two interviews between them. The first was in March or April, 1853, when they met at a vendue. The witness says, "he was alone, standing at the farm at a vendue at Van Embergh's; I walked up to him, and asked him how he got along; he shook his head, and said he did not know; then I told him he looked bad, and then he used the words again, *I don't know;* and then he told me he had lost his wife; I knew it before she was buried. Then he kind of made a motion with his hand, and acted very singular; but, says he, I am a speculator. What do you speculate in, I said. Well, says he, everything—so I looked at him and he began to grin. So then he asked me who I was; well, then I told him who I was. Well, he says, I don't know you; I then told him, if he did not know me, he did not know much at all." This singularity of conduct is accounted for by the witness himself. The witness discovered at once that it was the result of intoxication. He told deceased that he had been drinking too much, and walked away from him. The second interview referred to by the witness was in February, 1854, in Paterson. The deceased was with his black man, who, at the moment witness saw him, was helping deceased out of his wagon. Witness asked him how he did, when "he looked around kind of wild, and asked his black man who that was." The witness says, "*I saw he was pretty well drunk,* so I walked off, and I have not seen him since." The witness saw him at another time, when he does not say he was under the influence of liquor, and at that time he says he talked rationally. The witness says he formed his opinion from the talk and actions and peculiar laugh of the deceased; and yet, when he was sober, there is no pretence of his ever having exhibited to the witness any of these peculiarities. They were all perfectly natural to a man under the influence of liquor; and it is very manifest, from all the witness says,

that, according to his own observation, the actions and remarks which he considered as evidences of mental aberration were not observable when deceased was sober.

The next witness called upon by the caveators was James B. Beam. He was a nephew of the testator's wife, was in the habit of visiting the testator frequently; their families were on friendly terms. This witness testifies to many interviews between himself and testator, and details the conversations. They were upon the subject of the testator's property, his relations, and domestic concerns, and upon his intended disposition of his property. These conversations the witness testifies to as all perfectly rational, and as they are detailed by the witness they appear to be so. The witness does not mention one fact, during their long and familiar intercourse, from which the inference can be drawn that he was not of sufficient mental capacity to make a will. He says, "whenever I saw him he always talked rational." The witness does not express an opinion unfavorable to the testator's capacity. He says that deceased was an intemperate man, and that he never saw him when he had not been drinking more or less; that he had seen him when his drinking habits would not interfere with any particular business he might have on hand, and that he had seen him in liquor when he would consider him incapable of attending to any particular business. And the witness adds, "any man in liquor I consider incapable of attending to business; I don't know that it would interfere with his judgment particularly." He further says, he can't say he ever observed any particular change in testator's mind from the time he first knew him until the Monday previous to his death; and that he never saw him, when he was sober, that he was unfit to do business until up to the time of the Monday mentioned.

Col. Josiah Beam, whose sister the testator married, mentions no fact from which he is willing to infer the testator's incapacity. He had seen him when he was in great grief occasioned by the death of his wife. He would pull his hair and say he was crazy, but at such times the conversation

they had together showed the testator was perfectly rational; he says he saw no change in the testator's mind up to June, the day before the will was made, and that he did his business as well as other men about the neighborhood. The witness saw him the day before the will was drawn, and says, that on that day he could not possibly have composed his mind so as to dispose of his estate, nor any other man in his situation. The witness describes that situation. It was great bodily suffering from the disease which had seized upon him; and the discomposure of his mind was owing to the suffering of the body.

Rebecca Garrison is the most important witness produced on the part of the caveators; and if she cannot state facts and circumstances connected with the deceased, from which the conclusion can be drawn that he had not sufficient mind to enable him to dispose of his estate with understanding and reason, then that fact cannot be established. She was the sister of testator's wife, and had lived in the family since the year 1850. Since the death of the testator's wife, in December, 1852, she had the charge of the domestic affairs of the family. She always ate with him at his table, conversed freely with him about all his business matters and his troubles, and was his only confidant after his wife's decease. She knew more about him than any other living person. She was a most willing witness on behalf of the caveators, and they have obtained from her, as a witness, the full benefit of all she knew to their advantage. The first circumstance the witness details was an occurrence in February, previous to the testator's death. As the testimony of this witness is so important, I shall, in referring to it, give the facts she states in her own language. She says: "the last of February of last year the testator left home to go to Bartholf's; the sun was about an hour high; I asked him how long he was going to stay; he told me he didn't know whether he would stay till bedtime or not; I told him I would wait, and would not go to bed until he came home; he said I must not be afraid; my son was with him. He

came home about seven o'clock in the evening; he came to the gate, and told my son uncle Peter was come; he stepped on the stoop, and knocked at the door; I never knew him to knock at the door before; I said come in; he opened the door, and came a little distance on the floor, and asked if he could stay there, and my boy told him yes, and he thought he was joking. He did not appear to be in liquor; he looked very wild when he came in, and asked if he could stay; he then turned round, and went out again, and went through the little gate again and big gate, and went up the road as fast as he could step. I told my son to go after him, and fetch him back; he went after him, and fetched him back in the house. He said, when he came in, he was not at home —it was not his house, it was other people's house. Then he took the candle, and opened the middle door, and went into the entry, and holding up the candle, and looking all about, he said, this is not my house, it is other people's house; and when he was alone in the entry I peeped in to see what he was doing, and he was talking to himself. In my opinion he was not in his right mind at all by his appearance. Then he came out of the entry, and went out of doors the second time; he came out of the middle door again, and said it was not his house, and he was going home. My son went after him again, for the second time, and got him by the corner of the granary, and asked him to come in. Testator then had a pen-knife in his hand open—it was a knife with two blades, and he had the big blade open, which was about as long as my finger; then when he came in he wanted to go off again, and said it was not me; it was no Beckey in the house. We wanted him to lie down—to go to bed. We could not, at first, get him to do so. He said he wanted to go home; he started up and looked at the bed and said, this is not my bed—I am not going in that bed so at last we got him to lay down, and after he was in, he wanted me to go to bed; I told him I could not, I had some work to do. I did not want to leave him alone there; I stayed with him until between three or four o'clock, and

never closed his eyes in that time. A little before the time of which I have been speaking it seemed as if he was bewildered in his head; he laid down, and asked me if I had any eggs in the house; I told him I had, and he told me to get one, and told me to crack it in a glass; I cracked it in the glass, and gave it to him, and he drank it up. He then said, give me another one; and I gave him another one, and he took it; he then asked for another one, which was the third; he took that, and asked for the fourth, and took that; he asked for the fifth one—I gave him the fifth one, and he took that; he asked for the sixth, but did not get it. John Bartholf was there, and said, brother now stop, you have got enough. He seemed as if he was bewildered in his head. The first day of March last he and I had been to Peter Bush's. I did not hear of anything until he stepped out of the sleigh on his return. He said his head felt so queer he wanted me to help him in the bed as soon as I could, for it seemed as though the house went all around with him, he said; I got off his coat and boots—that was all I could get off. He wanted to lay down so, and I was chiefly all night up with him. He seemed very much bewildered in his head, and was talking about everything; he was not drunk that night."

We have here detailed by the witness all she ever heard him say, or saw him do, during the period of the last four years of his life, which was any evidence of unsoundness of mind. At most, it proves only that there were three nights during the last four years of his life when he was out of his mind. The fact of the short duration of these attacks, not lasting even until the following morning, proves beyond a doubt the *general* soundness of the testator's mind. But a witness, John Bartholf, explains these circumstances detailed by Rebecca Garrison, which show they were only temporary, and were no evidence of a permanent unsoundness of mind. It was at his house the testator was in February, as the former witness alluded to. He says he remembers the time; that testator had drank a little too freely; that he had a

little too much when he came there. This, then, v more than a fit of drunkenness, and not a fit This witness was present, too, at the time of th taking so many eggs. He tells us that the eggs with metheglin, and it is not surprising that si succession, without any interval except of time s prepare the drams, should produce a temporary of mind and prostration of body. There were se witnesses examined for the caveators, but they facts not already alluded to as having been detail witnesses. Now it is quite impossible that the te ing the last years of life, should have been so fee and body as to render him incapable of transacti and unfit to dispose of his property, and yet Reb son, with him almost every hour of those years, be able to mention any other facts from which pacity could be inferred. I do not refer to any nesses of the caveators, because they mention no than are detailed in the testimony already exami

It is very evident that there is nothing in the upon which the witnesses found their opinions c pacity of the testator, which should induce the co tate in admitting the will to probate.

It is shown that the testator indulged to exces of ardent spirits; that he was an habitual drun his body wasted away by degrees under the effect dulgence, and that it was the cause of his death. sympathized with his body, and although excessi tion did not deprive him of the use of his underst reason, it greatly impaired them, and at times re incapable of transacting any business. It is furth that though it may be true that the deceased's g of mind did not render him incompetent to make that, at and about the time the will was executed was so debilitated, in consequence of the use of ar and his bodily infirmities, that he had not at that cient reason and understanding to perform so in

act as that of dictating and executing his last will and testament.

Abram Garrison, the first subscribing witness, lived within two hundred yards of him, and had always been acquainted with him. He says that, during the last three months of testator's life, there were times when he appeared as rational as ever he was, and then there were times when he did not appear fit to do business; that on the day the will was executed, he found him, as he expected to find him, in a weak condition; that he was standing and walking, was very weak; he did not speak, but only nodded assent to the questions asked; he appeared to know and understand what was going on and what he was doing. He says the will was executed in the middle of the day, and he don't think testator had been drinking any that day.

James Bartholf, another subscribing witness, had known testator about eighteen years. He says he conversed with him, at the time, about having some surveying done for one Carter, and testator remarked there were so many leaves on the trees he did not see how the line could be run, and he was not able to go himself and show the corners. He offered the witnesses something to drink; he got the bottle, set it down, and told them to drink; he either called or sent for water; he did not drink with them; he said he did not drink any then; he said he thought he had not tasted any in two weeks. The witness says: "he seemed to me, from his conversation and actions, to be in his usual mind and faculties as I had before seen and known him; from anything I saw or heard then, at that time, and from what I saw of testator before, I did not have any doubt, at that time, but that his mind was right, and that he was competent to make a will.'

Let us now see what transpired in reference to the execution of the will, and look at the conduct and actions of the testator about and immediately before and after its execution, for the purpose not only of ascertaining the state of mind of the testator, but also of seeing whether there is anything in the second proposition of the caveators that, in

consequence of some mistake, fraud, or accident, the contents of the writing are not such as the decedent intended them.

On the day before the execution of the will the testator was very ill, and evidently felt that his life was fast drawing to its close. Without the dictation or suggestion of any one, on the afternoon of that day, he sent for Henry I. Speer, who was the draftsman of the will. The next morning he complained of his head, and said to Rebecca Garrison, his housekeeper, that he was too confused in his head to do what he had to do on that day. This shows that he remembered the day's work he had marked out for himself, and an anxiety that it should be performed; it shows his retention of memory, and that his mind was occupied with the subject of the final disposition of his property. There is no evidence that he took any stimulating drink that morning, and we have his own declaration to one of the witnesses that he did not. He told Mrs. Garrison, on that morning, that he had sent for Mr. Speer to write his will, although he had not made known that fact the day before, when Speer was sent for. There was no secrecy about the transaction. Speer came after breakfast. The will was executed about noon. Speer and a stranger dined there that day, and after dinner the three walked out on the farm together. A Mr. Banta came there to get a cider barrel, and the testator gave directions to his black man John where to find the barrel in the cellar, and cautioned him not to take one that was there marked with Van Dolson's name on it, and Mrs. Garrison says she did not see him do, or hear him say anything that day to make her think he was out of his head, except his remark, in the morning, that his head was confused. The evidence is very satisfactory that, on that day, he was entirely free from the effect of intoxicating drink, and that there was nothing said or done by him, on that day, to indicate that he did not enjoy, at that time, his ordinary strength and health of mind, memory, and understanding. When the will was executed, it was locked up in the bureau drawer, and the testator took the key. The next morning he gave Mrs. Gar-

rison the key, and told her to get the paper Speer had written the day before; he told her it was on the top of a little chest; the paper was handed to him, and he asked for his specs; Mrs. Garrison then left him, after telling him, if he wanted anything, to rap with his cane on the floor; he sat there nearly three hours, as the witness states; he knocked on the floor; Mrs. Garrison went up, and asked what he wanted; he then handed her the paper, and told her to put it away; she did so. Mrs. Garrison says she then asked "if it was wrote as he wanted it, and he said no, he could not make out one half of it, and what he could make out of it was not as he wanted it." The next day he wanted the will again, and Mrs. Garrison got it for him, and he examined it. She says she asked him if he was satisfied with it, and he said no, he was not—he could not make out one half of it to read it. The will was then put in the drawer, which was locked, and he put the key in his pocket. About a fortnight after this he sent again for Speer. He told Mrs. Garrison he wanted Speer to come and take care of it. Speer came there, and he and the testator were alone together. He dined there, and left in the middle of the afternoon. The witness, Mrs. Garrison, says they got the will, and sealed it up, and Speer took it home with him. Although the testator had before said that the will was not as he wanted it, there is no evidence that, after the will was sealed up and delivered to Speer, he ever made any complaint that it was not as he wished it.

This is certainly very strong evidence to show that the deceased executed this will with intelligence, and that the disposition of his property was made by this instrument as he desired it, without his being influenced or dictated to by any one. To corroborate this evidence of capacity, I will refer to a few only of very many particulars stated by the witnesses.

About the first of April, previous to his death, James B. Beam, a witness of the caveators, borrowed $500 of him. Testator told him that on the first of May he could let him

have all the money. He counted out $400, some in gold and some in paper, and gave Beam a note of $100, which he held against some individual. Beam took the money and note, and gave him his own note for it for $500. The note was endorsed by Mr. Beam's father, and testator said it was good, as in fact it was. He transacted this business without any one's assistance.

On the sixth of June, previous to his death, he executed a deed for some land to Aaron G. Garrison, another witness of the caveators. Some fifteen months before, he had executed a deed for the same property to the father of Mr. Garrison, and held his note for it. The deed had not been recorded, and the old deed was cancelled, that a new one might be given to the son. Testator held the father's note, upon which interest had been paid. This note was delivered up and a new one was given in place of it. This business was transacted by testator without any assistance and without his exhibiting any want of capacity.

On the eighth of the same month, Lewis White purchased of testator a yoke of oxen, a wagon, coal-box, and a sled. He paid $50 in cash, and gave his due-bill for $80, which was the balance. Mr. White says: "He went out with me to the barn, and showed me everything I bought of him; he fixed the price himself; there was quite a good deal of conversation between us respecting this purchase; he wanted to get a little more out of me for the things, and we finally agreed upon the price above expressed. At the time I saw no difference in his mind from what he had formerly been during my previous acquaintance with him; he then appeared in mind as I had always known him. After the eighth of June, I bought of testator some hay, corn, potatoes, butter, flour, and other small articles, between the eighth of June last and until within a day or two of his death. In all these business transactions I saw no want of mind or capacity to do business; he was as sharp to make a bargain the last transaction as he was at the first. A couple of weeks after the due-bill became due, which was the Wednesday previous

to his death, I went to testator's house to pay the due-bill; at the time it became due I was sick, and could not get out of my house. On the Wednesday previous to testator's death, when I paid the due-bill, I found him pretty sick, but his mind was all right; he knew me, and gave me his hand at the bedside; I asked him how he did, and told him I had come to pay him the due-bill he held against me; he said it was all right. I owed him, at the same time, a good deal for articles my hands had got of him while I was sick, amounting to some $55. Before that I did not know how much I owed him for these things; after I paid the due-bill, I asked him how much I owed him for them; he said it was all down in his memorandum book, as he had kept an account of it; he told the lady that kept the house for him, whom I had heard called Beckey Garrison, to go and get the book; after he had told her where she would find it, she went and got the book; he spoke, and told me to look over and see if it was right as he had put it down, and if I found anything wrong he would correct it; I found everything right except the hay, for which I thought he had charged a little too much; he had charged me $15 per ton, and I could buy hay elsewhere for $10 per ton as good as his; I told him so; he said I must put it down at $10, and deduct the difference from the bill; I stayed that day until three or four o'clock, and then went home. The money I owed him I paid to him myself; he sat partially up in his bed, and he looked over it while I counted it over to him two or three times, and he appeared satisfied; the money was in two dollar bills; he handed the money to the lady who waited on him, and told her to put it in the box where she had got the note from, which she did."

Jacob Gould went to work for testator, on his farm, on the twenty-eighth of June, which was two days after the execution of the will, and worked for him till he died. The next week after Gould went there, testator went out in the field and showed him which piece of grass he should cut first, and how he should cut it. He gave directions what work was to

be done from day to day, and in the evening Gould would report to him what work he had done. He says he never saw him unfit to do business, except the last day of his life. On the fourth of July he settled with Gould.

The last of May he called upon a neighbor to go with him to New York to purchase fish; they went together to New York, and testator went to his cousin's, in Brooklyn, and stayed the night. He engaged the fish to be delivered in June, between the tenth and the fifteenth. On the sixteenth or eighteenth of June he went to his neighbor, who had been with him to New York, to see why the fish had not come. This neighbor says he transacted his own business, and that he saw no difference in him from former years, except that he had a severe cough.

In April, testator sold a farm for $5400. He entered into a written agreement, by which he was to convey the farm in consideration of $500 in cash, and a bond and mortgage for the balance. On the ninteenth of May the deed was delivered and the bargain consummated.

On the third of July, testator entered into negotiations with Mr. Waters for the sale of another farm: he walked out upon the farm, and named his price at $5000; an offer was made of $4000; they parted to meet for further negotiations next morning; they met, and a written agreement was signed by both parties, which was a sale of the farm at $4000 with the reservation of that year's crops, and testator to retain possession of the farm until the following February. On the fifteenth of July the deed was executed, and a few days afterward the papers were exchanged. All these negotiations were commenced and carried through, on the part of the testator, without the aid or advice of any one on his behalf; that the sales were judicious, as to price and every other particular, have not been questioned by any one.

Elias Tolly and *Albert Brown* were inmates of testator's family from the sixteenth of May, immediately preceding his death, until the twenty-first of June, which was five days previous to the execution of the will. They saw him daily

and ate at the same table with him, and they never observed anything in his conversation or behavior to indicate that he did not enjoy the full possession of all his mental faculties.

But the caveators, as evidence of the incapacity of the testator, appeal to the contents of the will itself, and allege that they are such as to exclude the supposition of the testator's capacity. The contents of the will itself, coupled with the situation of the testator and the circumstances under which it was made, afford important evidence as to his capacity. (*Hall* v. *Warren*, 9 *Ves. jun.* 610.) And it seems that, from such evidence alone, where the terms of the supposed will are such as tend to exclude the supposition of the maker's sanity, the jury may decide against the validity of a will. (*Burr* v. *Daval*, 8 *Mod.* 59.) But it is clear, on the other hand, that it is not sufficient to show that the dispositions of the will are imprudent and unaccountable. (3 *Stark. Ev.* 1708.) No matter what the dispositions of the will may be—no matter how imprudent, unreasonable, or unaccountable they are—no *presumptions of law* can arise from them against the validity of the will, but mere natural presumptions from which a court or jury may draw the inference of the incapacity of the testator. In this case it is said that the dispositions of the will are not only imprudent, unnatural, and unreasonable, but that they are contradictory to the known intentions of the testator and to his repeated declarations regarding the final disposition of his property.

The nearest relative of testator living at his death was his brother, Garret Garrison, and all that was left him by the will is the wearing apparel, which is directed to be divided between him and testator's black man John, share and share alike. To one of the sons of Garret Garrison is given five hundred dollars, and to another son two hundred dollars. The bulk of the property is given to the Board family; three thousand dollars to Garret Hopper Van Horn, who married Mary Ellen Board, natural daughter of testator's wife before their intermarriage; five thousand to Peter G. Board, and other legacies to other members of the family. Eight hun-

dred dollars is left to Rebecca Garrison, a sister o ceased wife, and two hundred dollars to Henry I. S drew his will; five hundred dollars he directed to interest for the benefit of his black man John.

When the deceased married his wife she had a c who was a natural child. Testator himself had no by his wife. After their marriage, this daughter John F. Board, and the descendants of this daughte principal legatees of the will. It is shown, by sev nesses, that the testator repeatedly declared that th had received enough of his property, and that the never get any more of it, if he had his senses. come any presumption which might arise from these stances, it is shown that the deceased always manif greatest attachment and affection for his wife, an was the great grief caused by her death that occasi excessive intemperance, and the peculiarities whic hibited manifesting any failure or aberration of mi attachment he always manifested for the Boards, standing his many peevish complaints against the strongly relied upon. The daughter of Mrs. Garri with a sister of her mother until that sister's de daughter was then thirteen or fourteen years of a then went to live with the testator, and lived with her marriage with John F. Board. Peter G. Board lived with testator until his wife's death. There w any difficulty between the testator and any of t family, and his complaints about their not being enough to him were always made in a peevish ma were not so much a manifestation of any hostility as evidences of his mortification at their not reci his attachment for them. What is said by Rebecca shows the true state of his feelings towards them. "the old man was glad when the Board family, them, came there; when they did not come, he co of it, and said they didn't care about him." His c in Garret Hopper Van Horn continued up to the ti

death. After the execution of the will, and about ten days before his death, when he had confidential business to transact, he sent for Van Horn, and sent him to Paterson to exchange the papers in reference to the sale of his farm, and to receive the money which was to be paid. The remark he made to Mr. Goetchius, as late as May previous to his death, is calculated to mitigate the unfavorable impression of his declarations, that the Boards should not have any more of his property. He said, to Mr. Goetchius, he had blood relations who appeared very friendly, but he knew what it was for, it was only for his property, but they wouldn't get much of it; he said that he had no children of his own, but that he had children he considered his own, and he would do well by them. He alluded doubtless to the Boards as the children he had.

There is a circumstance mentioned by Rebecca Garrison, which shows clearly that the testator knew this will contained just what it in fact does, and that the testator, some days after its execution, remembered the fact well that it gave the principal part of his property to Van Horn and the Boards, and that the contents of the will were what he intended they should be. In July, after he made his will, he sent for Peter Garrison, one of his nephews, a son of his brother Garret. When Peter came, he told Rebecca Garrison to get some silver spoons he had in the house. She says, "he raised up in bed, and took the spoons out of my hand, and said, here Peter, these spoons I'll give to you; and then he said he did not want his spoons he got from his father to go among strangers; so he said, if they went unto the Boards and Van Horns they would be sold for old silver; that what he got from his father should stay among the Garrisons." Here was an intelligent recognition of the contents of the will. The Boards and Van Horns could not get them except under the will he had made. They were of no kin to him, and they could not possibly get the spoons or any other of his property but by will.

After giving this case the best consideration in my power,

my conclusion is, that the Orphans Court of the county of Bergen were right in making the order to admit the paper propounded as the last will and testament of Peter A. Garrison to probate.

EPHRAIM TOMLINSON, appellant, *and* JOHN C. SMALLWOOD and others, respondents.

An assignee, under the act entitled "an act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors," is not chargeable with interest on the dividend in his hands due to a creditor, although he may have delayed settling his final account in the Orphans Court for a much longer time than is allowed by the statute for that purpose, unless the claim of the creditor to his dividend was in some way affected by the noncompliance of the assignee with the requirements of the statute.

The statute makes it the duty of the assignee to declare the dividends, and make distribution without any order or decree of the court for that purpose. The dividends become payable as soon as there is money in hand for the purpose, without any control or action of the court. The statute requires no notice to be given to the creditor—it is his duty to make application to the assignee.

The filing of a final account is not intended as notice to the creditor that the dividends are ready.

If the creditor was not delayed or hindered in the receipt of his dividend by the delay of the assignee in settling his final account, but failed to receive his pay only because he neglected to call on the assignee and demand it, he is not entitled to interest.

It would be most burthensome and unjust to lay down the rule, that it is the duty of an assignee to go to the creditors, and tender them their money, and that on failure of his doing so the assignee should be chargeable with interest on the money in his hands.

This case came before the Ordinary on an appeal from the Orphans Court of Gloucester county. The facts are sufficiently stated in the opinion of the Ordinary.

Mr. Dudley, for appellant, cited *Nix. Dig.* 28, § 2; 2 *Kent* 230; 2 *Williams on Executors* 1567 (*note* 1); *Gray* v. *Thompson*, 1 *J. C. R.* 82; *Burrell on Assignments* 539.

W. L. Dayton, Attorney General, contra, cited *Eakin* v. *Cattell*, 1 *Harr.* 103; *Lake* v. *Park*, 4 *Ib.* 108.

THE ORDINARY. On the twenty-first of February, 1852, Benjamin Brown made an assignment, under the statute, for the benefit of his creditors, to the respondents, John C. Smallwood and Ephraim Tomlinson. On the twenty-second of May, of the same year, the assignees, according to the requirement of the statute, filed with the clerk of Common Pleas of the county of Gloucester a list of the debtor's creditors, which exhibited debts amounting to $8104.22. In the term of April, 1855, of the Orphans Court of the county of Gloucester, a rule was taken upon the assignees to file their accounts, and make a final settlement of the same, on or before the next term of the court. In September term, 1855, the Orphans Court made an order that the assignees should file their accounts twenty days previous to the then next December term of the court. On the sixth of December, and during the term of the court, the account was filed.

It appears, from the account, that there was in the hands of the assignees, to be distributed among the creditors, $2225.48. They produced vouchers showing that all the creditors had been paid their dividends except Ephraim Tomlinson, whose dividend amounted, as appears by the account, to the sum of $266.22.

On the twenty-seventh of December, 1855, the appellant filed exceptions to the account. By these exceptions, he claims interest on his dividend after one year from the date of the assignment. On the argument of the exceptions before the Orphans Court, the judges being equally divided, the exceptions were not sustained, and an order was made accordingly. From this order the appeal is taken.

It would be most burthensome and unjust to lay down the rule, that it is the duty of an assignee to go to the creditors and tender them their money, and that on failure of his doing so, the assignee should be chargeable with interest on the money in his hands. This is not contended for on behalf of

the appellant. But it is insisted that, inasmuch as the statute requires that the assignees shall render a final account to the Orphans Court within a certain period, and they not having complied with such requirement, that neglect imposes upon them the duty of paying interest on the money in their hands to which the creditors were entitled. It appears to me that unless the claim of the creditor to his dividend was in some way affected by the noncompliance of the assignees with the requirement of the statute in reference to exhibiting their accounts, the court has no right to impose, as a penalty of such neglect, that the creditor shall be entitled to interest. If the assignees are to be charged with interest on money in their hands, it is because they have not paid it to the creditor promptly at the time when by law he was legally entitled to it. Did the neglect of the assignees to file their accounts delay or hinder the appellant in obtaining his dividend, or was it owing entirely to his own neglect in not applying to the assignees, that he did not receive it at the time when the other creditors received theirs?

The assignment was recorded in the clerk's office of the county according to law. At the expiration of three months after the date of the assignment, the assignees filed with the clerk a list of all the creditors of the debtor who had applied to them, with a true statement of their respective claims. No exception was filed to the claim of any creditor. The statute then imposed the duty upon the assignees to proceed and make, from time to time, fair and equal dividends among said creditors of the assets which had come to hand in proportion to their claims.

It will be observed that the statute imposes the duty upon the assignees to declare the dividends, and make distribution without any order or decree of the court for that purpose. The dividends become payable to the creditors, as soon as there is money in hand for the purpose, without any control or action of the court. The statute requires no notice to be given to the creditors. It is their duty to make application to the assignees, and it is the assignees' duty to give to the

creditors, upon their application, such notice as will facilitate them in receiving promptly their money when it is due. In any of these respects the respondents have not been in default.

But the statute made it obligatory on the assignees to render a final account in the Orphans Court within a certain period named in the statute. At the instance of the appellant, the court cited them to account. And although they ought to have filed such account on or before the twenty-second of May, 1853, it was not filed until the twenty-fourth of November, 1855. For this neglect, it is insisted that the assignees should pay interest to the appellant on his dividend. If this neglect hindered or embarrassed, or delayed in any way the appellant from receiving his dividend from the time when it was due until he did receive it, then his dividend should draw interest, but not otherwise. How is the fact?

The accounts of the assignees are all correct. There is no objection interposed to their allowance by any creditor. The creditors all received their money when demand was made, and it was owing entirely to the neglect of the appellant that he did not receive his dividend. It was ready for him, but he did not choose to ask for it. He has received no injury—he has lost no interest—from the fact that the assignees were dilatory in filing their accounts. But he lost his interest because of his own negligence in not demanding the principal that was due to him.

It was said, in argument, that the filing of the final account is notice to the creditors that their dividends are ready. The statute intended it for no such purpose, and I cannot see that the court has any right to put such a construction upon it. It certainly appears very evident to me, in looking at all the facts as they are presented, that it is the appellant's own fault, and his only, that he did not receive his dividend. This being the case, I cannot see the propriety of allowing him interest.

The decree of the Orphans Court is affirmed.

MUNDY *vs.* MUNDY.

In the matter of the probate of the last will and testament of Michael Mundy, deceased.

A will can be cancelled in no other way than by its being burned, torn, or obliterated by the testator himself, or in his presence and by his direction and consent, or by a revocation in writing, executed in the same manner as wills are required to be executed.

A testator asked his wife if she had brought his will from its place of deposit according to his instructions, and at the same time informed her that he wished to burn it up. The wife replied that she had burnt it up. *Held*, that this did not amount to a revocation, the will not having been burnt.

Under the statute of this state, passed in 1814, it was requisite that the witnesses should be actually present, and see the testator sign the will. The act of 1851 makes the acknowledgment of his signature in the presence of the witnesses sufficient.

There is no argument to be drawn from the substitution of the word "*declared*," in the act of 1851, for the word "*published*," in the former act. Whatever would amount to a *publication* would answer the requirement that it should be *declared* to be the testator's will.

It is manifest that the authors of the act of 1851 did not intend to affect any wills executed in compliance with the requirements of the old act.

The attestation clause to a will is *prima facie* evidence of the facts stated in it; and the instrument will not be rejected because the witnesses fail to remember the mode of its execution.

If there is no attestation clause, there must be affirmative proof of the publication by the testator and of the other requisites.

There must be some declaration by the testator that it is his will, and a communication by him to the witnesses that he desires them to attest it as such. But this need not be by word: any act or sign by which that communication can be made is enough.

Adrain and *Blauvelt*, for caveator.

Mr. Leupp, for executrix.

THE ORDINARY. This is an appeal from the decree of the Orphans Court of the county of Middlesex, refusing probate to the will of Michael Mundy, deceased. The decree of the court states, "that the paper writing, purporting to be the

last will and testament of the said Michael Mundy, deceased, bearing date the 2d of April, A. D. 1835, and so presented for probate as aforesaid, and *caveat* filed against the same, is not proved to be the last will and testament of the said Michael Mundy, deceased, and that letters testamentary ought not and do not issue thereon." There are no reasons given for the decision of the court; but I presume they did not consider the proof sufficient as to the requirements of the statute having been complied with in the execution of the will.

There was considerable proof taken as to testamentary capacity. There is no room, however, to doubt as to the testator's capacity. Laying out of view altogether the rebutting testimony offered in support of the will, the testimony taken on this point on the part of the caveator does not cast a reasonable doubt upon the competency of the testator to make a testamentary disposition of his property.

There was some testimony taken also in reference to the cancellation of the will. A witness says, "I was at his (testator's) house fifteen years ago, and Mr. Mundy asked his wife for the will, and she said it was at Piscataway-town; she said, to Mr. Mundy, what do you want of it? he said, I want to burn it up; she said, it is at Piscataway-town; she said, when I go down there I will get it: when she came home, he asked her if she had got the will—she said no—what do you want of it? I want to burn it up, he said; she said, I have burnt it up; that was about fifteen years ago." If implicit confidence could be placed in the testimony of this witness, it would not affect the validity of the will. The will was not burnt up. The testator ought not to have relied upon the declaration of his wife. If he had seriously desired to cancel the will, he could have done it without having the will in his possession. The will could be cancelled in no other way than by its being burned, cancelled, torn, or obliterated by the testator himself, or in his presence and by his direction and consent, or by a revocation in writing, executed in the same manner as wills are required to be exe-

cuted. This will was neither cancelled or revoked in the manner directed by the statute.

As to the *execution* of the will, the testator having died subsequent to the fourth of July, 1850, the will must have been executed in compliance with the requirements of the statute of March 12th, 1851, in order to admit it to probate. There is no difference, as to the attestation and execution of a will, between the acts of 1714 and of 1851, except as to the number of witnesses. The former act required *three* attesting witnesses—the last act requires *two* only. There is some difference in the language of the act. The act of 1714 declares that the will shall *be signed and published by the testator* in presence of three subscribing witnesses. The act of 1851 requires it shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will and testament. Under the act of 1814, it was requisite that the witnesses should actually be present and see the testator sign the will. The last act makes the *acknowledgment* of his signature in the presence of the witnesses sufficient. There is no argument to be drawn from the substitution of the word *declared* for *published*, as was supposed by counsel. The last act requires no more formality in this respect than the former. Whatever would amount to a *publication* would answer the requirement that it should be *declared* to be the testator's will. It is manifest that the authors of the act of 1851 did not intend to affect any wills which should have been executed in compliance with all the requirements of the old act.

The attestation to this will is as follows: "Signed, sealed, published, pronounced, and declared by the said Michael Mundy to be his last will and testament, in the presence of us," to which is subscribed the names of three witnesses. The will bears date more than twenty years ago. One of the subscribing witnesses, who was the scrivener who drew the will, is dead. Another one, who was quite young at the time, has no recollection of the transaction, but readily

cognizes her signature. *Mrs. Manning* has a distinct recollection of the fact of her witnessing the will, but a very imperfect and confused recollection of the particulars of the transaction. In attempting to call them to remembrance, and to give them in detail, she is led into some contradictions, which afforded counsel some room for argument that the statute had not been complied with. The will has the attesting clause, which, if true, shows that all the requirements of the law were fulfilled. Although the witnesses may have forgotten whether they were all present, and saw the testator sign the will, or whether he made any publication or declaration of it, the instrument ought not to be rejected on account of such mere want of recollection. The attestation clause, with the signatures of the witnesses, is *prima facie* evidence of the facts stated in it. It may be overcome by the witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with its verity. If there is no attestation clause the case is different. In one case there must be affirmative proof of publication and of the other requisites; in the other, there must be affirmative proof of the want of those requirements. *Grant* v. *Grant*, 1 *Sand. Ch. Rep.* 235; *Remsen* v. *Brinkerhoof*, 26 *Wend.* 324, 339.

The facts which the witness distinctly remembers are consistent with the attestation clause. She recollects distinctly of the testator, her husband, and herself being in the room, and while all there together, her husband called her, and asked her to sign the will as a witness. She has no recollection of testator's saying anything when he signed the will. She says it was understood at the time that he signed it as his will. She says she has a recollection of seeing Mr. Mundy sign the will; that he did not say anything to her when he signed it.

There seems to be sufficient proof of all the requirements except as to his declaring it his will. There must be some declaration by the testator that it was his will, and a communication by him to the witnesses that he desires them to

my conclusion is, that the Orphans Court of the county of Bergen were right in making the order to admit the paper propounded as the last will and testament of Peter A. Garrison to probate.

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It would be most burthensome and unjust to lay down the rule, that it is the duty of an assignee to go to the creditors, and tender them their money, and that on failure of his doing so the assignee should be chargeable with interest on the money in his hands.

This case came before the Ordinary on an appeal from the Orphans Court of Gloucester county. The facts are sufficiently stated in the opinion of the Ordinary.

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THE ORDINARY. On the twenty-first of February, 1852, Benjamin Brown made an assignment, under the statute, for the benefit of his creditors, to the respondents, John C. Smallwood and Ephraim Tomlinson. On the twenty-second of May, of the same year, the assignees, according to the requirement of the statute, filed with the clerk of Common Pleas of the county of Gloucester a list of the debtor's creditors, which exhibited debts amounting to $8104.22. In the term of April, 1855, of the Orphans Court of the county of Gloucester, a rule was taken upon the assignees to file their accounts, and make a final settlement of the same, on or before the next term of the court. In September term, 1855, the Orphans Court made an order that the assignees should file their accounts twenty days previous to the then next December term of the court. On the sixth of December, and during the term of the court, the account was filed.

It appears, from the account, that there was in the hands of the assignees, to be distributed among the creditors, $2225.48. They produced vouchers showing that all the creditors had been paid their dividends except Ephraim Tomlinson, whose dividend amounted, as appears by the account, to the sum of $266.22.

On the twenty-seventh of December, 1855, the appellant filed exceptions to the account. By these exceptions, he claims interest on his dividend after one year from the date of the assignment. On the argument of the exceptions before the Orphans Court, the judges being equally divided, the exceptions were not sustained, and an order was made accordingly. From this order the appeal is taken.

It would be most burthensome and unjust to lay down the rule, that it is the duty of an assignee to go to the creditors and tender them their money, and that on failure of his doing so, the assignee should be chargeable with interest on the money in his hands. This is not contended for on behalf of

property that indicates an unsoundness of mind. With exception of three small legacies, he gives his propert those who would have taken it by law if he had died i tate—his brother and sister—who are his only heirs-at and next of kin.

But it is said, that although the will bears upon its no evidence of unsoundness of mind, yet in fact the dis tion there made by the decedent of his property was in lation of an arrangement which he had made with his since then deceased, under circumstances which would induced him not to disregard it, had he possessed that so ness of mind which rendered him capable of intellige disposing of his property.

The testator's wife, when he married her, was seize her own right of a house in the borough of Bordent He agreed with his wife, that if she would unite in the per conveyances, so as to vest the title of that propert him, he would, by his will, dispose of his property in a ticular way specified. Such conveyances were made. the twenty-first of December, 1840, the property of his was vested in the testator in his own right, and on the day he made his will, in pursuance of the arrangement r with his wife. By that will, he gives to his wife, during natural life, the income of all his estate, real and pers He gives to the children of John L. McKnight, the chil of Jacob K. Train, and Ellen Graham (who are alleged t the cousins and heirs-at-law of testator's wife, but of w there is no proof,) the sum of $3000, to be divided eq among them, share and share alike. The said bequest named to be void in case the testator's wife should l issue by him, or by any future husband, and in such such bequest to be for the benefit of such issue. The res of his estate he gives to such persons as would by law been entitled to his property had he died intestate.

By the will propounded for probate, the testator to disregards the arrangement made with his wife, and w was recognized and carried out by the will of 1840, ex

so far as relates to the children of John L. McKnight. Instead of the $3000 which he had given to the children of John L. McKnight, Jacob K. Train, and Ellen Graham, he gives one hundred dollars to each of the children of John L. McKnight, and makes no mention of Jacob K. Train's children or of Ellen Graham.

I think the change which appears to have taken place in the relative situation of the parties, and their respective circumstances between the years 1840 and 1853, sufficiently account for the different disposition of the testator's property, and his disregard of the arrangement which had been entered into between him and his wife, without attributing it to an unsoundness of intellect, which rendered him incapable of appreciating any moral or legal obligation he might be under to provide for the next of kin of his deceased wife.

His wife died within a year after the making of the first will. She left no issue. Thirteen years had passed since the execution of the will. John L. McKnight had, since then, inherited a fortune of upwards of $300,000, and one of his children had settled in a foreign land. The children of Jacob K. Train were living in a distant state of the Union, if living at all; but no one of the witnesses seemed able to give any account of them or of the whereabouts of Ellen Graham. It is true a *caveat* had been filed in their behalf, by J. L. McKnight as their attorney, but no power of attorney was produced, and the fair presumption is, after what took place on the investigation, that there is no such power of attorney in existence. After the inquiry made for Ellen Graham and for the children of Jacob K. Train, it was the duty of those opposing this will to have given some evidence of their being still alive, and of the authority to appear for them, if they wished to attach any importance to the fact of their not being mentioned or provided for by the will.

Taking into consideration all these circumstances, I do not think any conclusion unfavorable to the capacity of the decedent can be drawn from his not providing for his wife's relatives by his last, as he had by his former will. The

legacy of a hundred dollars, each, to the children of Mr. McKnight, shows that the arrangement he had made with his wife was not obliterated from his memory.

Was the testator, when he executed the will of 1853, of that sound disposing mind and memory which the law regards as sufficient to render him competent to dispose of his property by will?

On the 27th of October, 1841, the decedent was declared a lunatic by the Court of Chancery upon the usual proceedings had for that purpose in the court. Nathan Satterthwait was appointed the guardian of his person and property. He was sent to a lunatic asylum at Frankford, in Pennsylvania, where he remained seven or eight years. He then resided with his guardian, until he left his dwelling, in a clandestine manner, on the 10th of November, 1851. On the 6th of June, 1851, he presented a petition to the Court of Chancery, setting forth the proceedings upon which he was declared a lunatic—that he was found a lunatic from disease produced by the excessive use of ardent spirits; that he had entirely ceased and abandoned the use of all spirituous liquors, and was restored to the full possession and enjoyment of his reason and understanding.

After a full investigation under the direction of the court, the inquisition of lunacy was vacated, and the decedent was restored to the full possession of his property.

On the first of November following, he purchased a farm of eighty-two acres, near Bordentown, for the sum of three thousand five hundred dollars; he stocked this farm, at a cost of nearly $500, and went to farming; he bought and sold for himself, and transacted all the ordinary business required in carrying on such a farm; he had very considerable money transactions with various individuals; he kept a bank account, deposited his money, and drew it out from time to time by checks; he kept memoranda books, in which he entered generally, in his own writing, moneys which he from time to time received, and took receipts for money paid out. The books are neatly kept, and the entries made correctly

nd intelligently. All these transactions were almost of aily occurrence up to within a few days of his death, which ccurred in June, 1853.

The will was executed in the presence of three subscribing witnesses. It was drawn up by a gentleman of intelligence, a resident of Burlington county, who had long been acquainted with the testator. Mr. Tindall, one of the witnesses, had but a short acquaintance with him. He had known him only two years, and within that period had worked for him, repairing his farm and fences. Mr. Atkinson, another subscribing witness, had known him for twenty years; and the other witness, Mr. Carman, had been acquainted with him all his life; they had been brought up as boys together. These witnesses all concur that there was not much said by the testator at the interview when the will was executed. He met them at the door of the house, and shook hands with them. After remaining a short time in the front room, the witnesses retired to a back room, leaving Mr. Biddle, the scrivener, Samuel Pancoast, the brother of testator, and testator in the room together. After some time the witnesses were recalled. Testator then took his seat at the table, and signed the will. He put his finger on the seal, and acknowledged it as his last will and testament, using this language—"throwing all wills a one side heretofore made by him, or purporting to have been made by him." After the execution he thanked the witnesses, and invited them to stay to dinner. There was then some general conversation, in which testator participated. He followed the witnesses out of the room when they left; he walked out with them in the yard, and talked about the shrubbery, and showed them his roses, and after about ten minutes' conversation in the yard they parted. The witnesses all concur in the opinion that he was competent, at the time, to make a will. There was nothing said or done by him, at the time, to indicate any want of capacity. His conversation was rational, and his conduct in all respects unexceptionable, and marked by no peculiarity.

Resting the case here, no one would doubt the capacity of the testator. His former aberration of mind had been occasioned by excessive indulgence in intoxicating liquor. It was not strange, that after abstaining from this indulgence for upwards of ten years, and being perfectly restored to bodily health, there should be a restoration also of his mental faculties. It is true, in such a case we are not to expect the mind to reassume all its former vigor. The question is as was said in *Towart* v. *Sellars*, 5 *Dow.* 231, whether he has recovered that *quantum* of disposing mind at the time of the execution of the writing which ought to give it effect.

But the caveators meet this case with an array of witnesses formidable both as to intelligence and numbers. I have examined all the evidence with great care, with a sincere desire that I might not err in my judgment of the case.

Doct. Dewer may be considered, I think, the most important witness for the caveators, and his judgment is entitled to great deference. He was acquainted with the testator for fifteen years, and attended him, as a physician, while he was with his guardian, and after his removal to his farm. The doctor states some facts, as evidences that he was not entirely of sound mind at all times during the last three years of his life. But the doctor does not say that, upon these facts, he formed an opinion that he was not competent to transact business, or had not capacity enough intelligently to dispose of his property. He details several conversations with him, and says that from them he was led to believe he was not *entirely* restored to his mind. The doctor shows that, in other interviews with him, he was perfectly rational and remarks, that "it frequently happens that a person that has been thus afflicted is restored, so as to enable him to undertake all the ordinary relations and business of life and to manage his business affairs, and yet retain for a long time some peculiarity of thinking and acting on particular subjects." In concluding his testimony, the doctor says: "from the time I first knew Lewis Pancoast, I have known him to enjoy lucid intervals; so far as I have conversed with him,

have at times seen him so as he appeared perfectly sane; I mentioned two instances this morning; judging so far as I could see, I considered him to be perfectly competent to transact business—I refer to the whole time of my acquaintance with him; I have conversed with him when he appeared as rational as any person at times; during the last interview I had with him, and which was on his farm the spring before his death, he said or did nothing indicating insanity."

I place the utmost reliance upon the testimony of Doct. Dewer. The facts he states are undoubtedly correct, and his opinion from his facts commends itself to our judgment. If his estimate of the testator's mind is correct, the validity of the will is not at all impaired by his testimony, if the evidence of the scrivener and of the subscribing witnesses establish the fact that the will was executed by the testator in a lucid interval. The doctor being perfectly satisfied that he had such intervals, his evidence corroborates the evidence in support of the will. The doctor does not mention a single instance of any interview with the testator, in a professional way, when he found him wandering in his mind. He specifies the number of conversations with him as only two or three, when he exhibited evidences of a disordered mind, and these were during the last year of his life. Now it is shown that, during the last year of his life, he indulged in the use of ardent spirits. This would produce the very state of mind which the doctor describes. On the day the will was executed there was nothing in the testator's conduct to indicate that he had been indulging in strong drink.

Doct. Worthington's testimony has but little bearing upon the question at issue. He speaks of the testator only when at the asylum. He never saw him after he left there. As to his opinion when he last saw him, that he never would be able to transact the ordinary business of life, it is proved erroneous by nearly every witness sworn.

Doct. Longstreet was acquainted with the testator from the year 1845. In the year 1851, immediately after he left his guardian's, the doctor visited him professionally, for the first

time, several days in succession. He continued his m attendance upon him up to the time of his death. I the whole time he knew him, he declares he was an i man. He says his mental powers were more impai there was any change at all, after he was restored to hi perty; that he was not capable of attending to the or business of life, could not keep a book of account, an not capable of judging of the value of property gen The doctor says he does not believe he understood w kindred and relations in life were; that during the 1853 he had not memory and understanding sufficie dictate a will disposing of his property. The docto this defectiveness of mental power consisted in w memory and in certain *delusions* under which he was ing. He gives us no single instance in which a w memory existed. The delusions under which he was ing the doctor specifies to have been, that some t years previous he had fallen into a lime-kiln, and be verely burned and that a hostile feeling had existed be himself and his father and his brother and sister. same facts are referred to by all the witnesses who gi opinion unfavorable to his soundness of mind. But these in fact delusions? If any reliance is to be placed human testimony, the fact about the testator's having burned by falling into a lime-kiln is proved beyond di The fact of the testator's having been the owner of a kiln, and for a number of years carrying on the busin admitted. Three witnesses testify to having been pres the time of the accident. They not only state the fac detail the circumstances of the occurrence—how he w tricated—placed upon a settee, and carried to a store neighborhood, and thence to his own house—the day week it occurred—the persons present, and the phy who attended him. The story, as it is told, bears u face the impress of truth. The witnesses corroborate other, and their characters for truth and veracity a impeached. The testator carried the scars of the bu

his life. They were seen by a number of witnesses. With the evidence before me, the fact of the occurrence cannot be doubted. The hostility, too, that the testator exhibited towards his father and his brother and sister is rationally accounted for. He had difficulties with his father and with his brother and sister. It is unnecessary to inquire who was in the right. It is sufficient for our purpose to know that friendly feelings did not exist between the parties. A conclusion that the testator was of unsound mind, because he was laboring under delusions in these particulars, is a conclusion drawn from false premises. They were not delusions. Doct. Longstreet's opinion, that he was not capable of attending to the ordinary business of life; that he had no appreciation of the value of property; did not understand who his kindred and relations in life were, and had not memory and understanding enough to dictate a will, are proved by facts to be entirely erroneous. He carried on his farm with judgment and economy—made improvements upon his farm —employed men to do the work—bought and sold property—paid out and received money—rented out property of which he was the owner, and collected the rents—kept books of account, and kept them neatly and intelligently. In all these various transactions there is no evidence of his committing any error in judgment, or of doing his business in a manner to betray any lack of memory, prudence, or understanding. A witness, who lived with him from the time he moved on the farm till his death, says that he attended to all his ordinary business without any assistance—that the bargains he made were reasonable. He never knew him to make a foolish bargain—that he directed all the improvements on his farm, and that they were judicious, and such as a reasonable man would have made. This witness says: "Mr. Pancoast spent his evenings at home with his family; he read the newspapers to me in the evenings; he spoke to me about the news of the day and the contents of the paper; he had books, and used to read them to me and my family." I will mention here a few facts, which are clearly established, to

show that Doct. Longstreet labored under a great mistake to the capacity of the testator to transact the ordinary bu ness of life, and as to his being so entirely destitute memory. When his farm was taxed, he discovered that was taxed erroneously, and that no deduction had been m on account of a mortgage upon his farm. He appeared fore the commissioners of appeal, and explained the er and it was corrected. The testator purchased of one ir vidual seven hundred rails for his farm, and made the b gain himself. When a settlement was made, it was fo that he had himself kept an account of the loads as t were delivered, and it was correct. He settled by pay $30 in cash, and giving his note for the balance. In J 1852, he was called upon, in connection with one of neighbors, to make an appraisement of an intestate's p perty at the request of the administrator. There was s difficulty in making the appraisement, in consequence of character of the property. Mr. Pancoast gave his advic to the mode of appraisement, which was followed. The praisement was completed, and signed by the apprais One witness testifies that he was about purchasing a fa and knowing that the title had passed through some of ancestors of the testator, he applied to him for informati and asked him if he knew anything of the title. He rep that he did, and gave a general description of it, and the rious conveyances; he stated the portion of it that had co from his grandfather, and named over some other pers that different portions of it had come from. The witn found the information correct.

I have adverted to but few of the numerous facts, to sh that during the last two years of his life there were ti when the testator had mind enough certainly to transact ordinary business of life. They are certainly at varia with the opinion formed by Doct. Longstreet, that dur the whole of this period the testator was a lunatic, and enjoying lucid intervals.

I think it unnecessary to examine the evidence further

detail. There was a large number of witnesses examined on both sides, and as is usually the case, one class has no doubt of the testator's capacity to make a will, while the other has just as little doubt of his incapacity. I have not deemed it worth while to count them, to see which class is the largest in number. We might as well decide the case by taking their weight as by their numbers. It is very clear, from the facts I have alluded to, that whatever may have been the general state of mind of testator, he certainly enjoyed lucid intervals, and at such times was perfectly competent to dispose of his property. This being the case, the inquiry is narrowed down to the point—whether, at the time he made the will in question, he was in the enjoyment of such lucid interval? To ascertain this, we must rely upon those who were present, and witnessed the transaction. If they state facts to show that at that time he possessed mind enough to render him competent, the will must be established, unless their testimony is in some way impeached.

I have already alluded to the testimony of the subscribing witnesses. There was another witness present, and that was the scrivener who drew the will. Before adverting to his testimony, however, I would remark, that there is evidence going to show that the testator, prior to the execution of the will, had frequently declared his intention to make a will, and for the very purpose of making the alteration he did make between this will and the will of 1840.

He told Mr. Ellis that he wished to obtain the old will out of the hands of Mr. McKnight—said that it was a wrong will, and that he had been too much influenced in making it, and asked Mr. Ellis if he would not call on Mr. McKnight and get it. He at the same time gave his reasons why he should not call on Mr. Cannon or Mr. Hutchinson to draw his will. He said the former would not do, because he had written the former will, and was one of the executors, and as for the latter gentleman, there was some little misunderstanding between them in regard to his rents.

He said to Mr. Shreve, very soon after his restoration to

his property, that he had made a will before he went to t asylum, and that it was in the hands of Mr. McKnight; a he requested Mr. Shreve to call on Mr. McKnight and g it, with other papers of his in Mr. McKnight's possessi When Mr. Shreve gave him the reply of Mr. McKnight his request, *that he had no papers of Mr. Pancoast*, he w excited, and declared with warmth that he had, and amo them was the will, and that it was a will he had been forc to make. It was true that Mr. McKnight had some of papers, and among them this will.

He spoke frequently to Mr. Bartlett about the will t was in Mr. McKnight's hands, and said he intended to ma another will. He complained of Mr. McKnight's treatm to him, and said McKnight would not speak to him when met him.

A week or two before the execution of the will he ha long conversation with his neighbor, Mr. Lawrence, ab his affairs. He spoke of the will he had made, and said had made it to please his wife, and that he should make other will, and gave some reason why he had not done it fore.

There is another fact worthy of notice, and that is, we f the decedent prepared to be liberal to his brother Sam His feelings had entirely changed towards his brother. great anxiety he manifested for him while sick—his atte ance upon him during his illness—and the sympathy kindness which he exhibited towards him, were sure ind tions of a radical change in his feelings. Besides that, t affections of the heart were the natural fruits of the light that had dawned upon his intellect. Their moral intellectual faculties were congenial.

Notwithstanding the very decidedly unfavorable opini expressed by the witnesses for the *caveat* of the testat mental capacities, with the numerous facts before us, a of which only I have referred to, we are not surprised at testimony of William Biddle, the scrivener who drew will, confirming the opinions of the subscribing witnesse

the will, that at the time of its execution the testator was of sufficiently sound mind, memory, and understanding to transact that important business.

Mr. Biddle had been acquainted with him for twenty-six or twenty-eight years, intimately the last few years of his life. Samuel Pancoast, the brother of decedent, called on the witness on the morning of the 10th of April, 1853, and told him his brother Lewis wished him to come to his house, and write his will. The witness and Samuel went out together to decedent's farm. He met them at the door, and invited them in. After some little conversation, the witness alluded to the occasion of his visit. He said he thought he would have his will written, and told his brother to tell witness to come out, if he saw him. The witness then goes on to say, "I remarked to him that I was not very well prepared to write his will, but if he would give me the heads of what he wanted wrote I would take it down; he then went and got some paper and ink, and as I was going to take them up, Samuel Pancoast got up out of his chair to leave the room. Lewis said, Samuel, don't go out. He dictated to me what he wanted in his will, and I took down as he dictated to me, except one paragraph; I read it over to him after I had taken it down, and he said, I want you to leave two or three lines blank—I may think of something else I have forgot; he then said, when can you have it ready, and bring it here; I said, almost any time, and I fixed the next Monday, which I think was the 17th of April, and he said, very well." The witness then goes on to state what took place at that interview after this business was through. There was nothing said or done by the testator that exhibited anything at variance with his soundness of mind. The witness then details what took place on the day the will was executed. He went there on the following Monday with the will, as he had promised. The testator, he says, met them at the door, and invited them in. After a few moments' conversation, the three gentlemen who were in attendance as subscribing witnesses went into another room. The

witness then says: "After they went, Lewis asked me if I had the will with me; I answered yes, and took it out of my pocket, and handed it to him; he read it over very carefully, or appeared to, and handed it back to me; I then asked him if it was all right; he said, yes, as far as it goes; there is one thing, says he, I want in that is not here; I then said, there is a vacancy left, as you wanted, to put anything in; it is the last item in the will; the sixth item was then put in at his house: 'I do revoke all former wills by me made,' or purporting to have been made by me.' He gave me the words, which I inserted—I took them from his lips. After I wrote the sixth item, I asked him if there was anything further to write; he said no, except naming the executors; he did not name his executors the first day I was there. I then filled up the last item, and had it ready for execution; he then took the will out of my hand, and read it over again, and said it was all right, and told his brother Samuel to call the witnesses out of the other room; he then came up to the desk, in the presence of those witnesses and myself and Samuel, took up the pen, and wrote his name opposite the seal; put his finger on the seal, and acknowledged it to be his hand and seal, and his last will and testament." To the question, whether he considered the testator of sound mind, memory, and understanding at the time, he replied: I considered him to be so; I had not the least doubt about it either time I was there; if I had had a doubt about his testamentary capacity, I would not have drawn a will for him.

My conclusions, upon a review of the whole case, are the

First. It appears beyond a doubt that the testator, after he was restored by the Court of Chancery to the possession and management of his property, had lucid intervals, during which he was perfectly competent to make a will. I do not mean to say, that at any period after he was restored to his property he was incompetent; but that, giving to the evidence of the caveators its greatest influence, it proves nothing more than that the testator was a lunatic with lucid intervals.

Second. The three subscribing witnesses to the will, and the scrivener who drew it, and was present at its execution, present, by their testimony, a body of facts, embracing the conversation, conduct, and particular acts of the testator, which, if their testimony is to be relied upon, establish clearly that this will was the product of the testator's mind alone—that he dictated it with intelligence—comprehended it in all its bearings—appreciated the ties of kindred, and understood the character and extent of the property disposed of.

Third. There is no evidence going to impeach the moral character or intelligence of these witnesses. There is no pretence that the insanity alleged was of that subtle character as to deceive or mislead them. The only evidence of any pertinent fact bearing upon the material time of inquiry as to the testator's mind is this: it is proved that about that time, and within a few days of the execution of the will, and for a succession of several weeks, large quantities of ardent spirits were purchased at the neighboring stores, and carried to the residence of the testator. But there is no pretence that he was under the influence of liquor on the day of the execution of the will, or had been indulging at all on that day in the use of it. The evidence, therefore, was only important as going to show the producing cause of *general* incapacity; and as I have already observed, that if any such general incapacity existed, the subject of it had lucid intervals, it leaves the evidence of the witnesses, as to the soundness of the testator's mind at the particular time the will was executed, unapproached.

Fourth. The testimony of the subscribing witnesses, as to the sanity of the testator, is strengthened by the facts, that the will is a reasonable one on the face of it, and that its contents correspond with the repeated declarations of the testator.

Fifth. In the examination of this case, the following consideration is entitled to some weight. By this will, the property mainly is given to the heirs-at-law and next of kin, who are satisfied with the will as it stands. There is no other

will propounded for probate. The caveators, if they claim as devisees or legatees under another will, should have propounded it for probate. No other will is offered for probate, and the presumption is that if this will is not established the decedent died intestate. If this is so, the caveators will derive no benefit from defeating this will, and the property of the decedent will go to the persons who are satisfied with the disposition made of it by the testator by the will in question.

DAVID K. BOYLAN and others, appellants, *and* ISAAC MEEKER and others, respondents.*

When, in a controversy about the probate of a will, it was alleged that the paper offered for probate was not a genuine will, but that it was surreptitious or procured, and was never executed by testator as his will, it was held that, in that aspect of the case, it was competent for the caveators to show that the provisions of the will in controversy were contrary to the expressed intentions, views, and feelings of the deceased before the time it bears date, and to his declarations subsequently made.

The will offered for probate held, after an elaborate review of the evidence, to have been fraudulent and surreptitious, and not executed by the testator.

The costs and counsel fees of the party offering the will for probate were ordered to be paid out of the estate, because of the absence of direct proof of fraud on the part of the party offering it, or of knowledge on his part that it was surreptitious, although he was a large beneficiary under it.

This cause came before the Ordinary on an appeal from a decree of the Orphans Court of the county of Essex, refusing

* See *Boylan* ads. *Meeker*, 4 *Dutcher* 274.—Although this very able and interesting opinion of Mr. Justice Potts was delivered as long ago as 1854, and is almost exclusively confined to a discussion of questions of *fact*, the reporter has thought proper to publish it here (greatly out of its chronological order) in order that our reports may exhibit all the *phases* of the litigation arising out of this remarkable case in our state courts. It may be added, that an action of ejectment was brought by a party claiming under this will in the Circuit Court of the United States for the District of New Jersey, which resulted in a verdict for the plaintiff, thus establishing by the verdict of a jury in that cause the genuineness and validity of the will.

to admit to probate a paper purporting to be the last will of Jonathan M. Meeker, deceased, propounded by David K. Boylan, who was named as one of the executors in the will, and to whom large legacies were given by it.

The decree appealed from also denied costs and expenses to the party propounding the paper.

The case was heard in the Prerogative Court, before the Honorable Stacy G. Potts, one of the associate justices of the Supreme Court, who was called in to hear it by the Ordinary.

Bradley and *W. Pennington*, for appellants.

Frelinghuysen and *A. Whitehead*, for respondents.

Potts, J. The Orphans Court of the county of Essex, on the 15th June, 1853, decreed that a certain paper, propounded for probate in this cause, marked *Exhibit A*, and bearing date the 12th day of January, 1852, is *not* the true last will and testament of Jonathan M. Meeker, the alleged testator therein, &c., and that the same has not been well proved, and ought not to be established or admitted to probate, &c. From this decree David K. Boylan and others appeal to this court; and the question is, whether there is error in that decree.

The testimony and exhibits taken and made in the court below are before us. The case is one of much importance, the evidence very voluminous, and in some of its aspects singularly conflicting and embarrassing. The case has been most elaborately and ably argued; and I have endeavored to give to it a careful, patient, and attentive examination.

The deceased was an old gentleman, of about seventy-two years of age, residing at New Providence, in Essex county. The paper propounded as his will is alleged to have been executed by him on the evening of the 12th January, 1852, at the house of Mr. Jonathan E. Hoyt, and in the presence of Hoyt's family; and to have been taken away by him when he left the next morning. It is further alleged, that some weeks afterwards—from one to three or four—he brought

it again to Mr. Hoyt, and deposited it with him, and that it was then enveloped and sealed up, and remained in Mr. Hoyt's custody until some ten days after the testator's decease, which occurred on the 22d day of May, more than four months after the time of the alleged execution. It was then opened, and deposited by Mr. Hoyt with the surrogate, and subsequently offered for probate.

I propose to consider the questions presented by this appeal in the following order.

I. Did Jonathan M. Meeker, the deceased, actually execute a will at the house of Jonathan E. Hoyt on the evening of the 12th January, 1852?

II. If he did, was he at that time of sound and disposing mind, memory, and understanding?

III. And if both these questions are settled in the affirmative, the only remaining inquiry will be, is the paper offered for probate *that will?*

I. Then as to the alleged execution of a will at Hoyt's at the time specified.

Hoyt lived about eight miles from the residence of Meeker. Two witnesses, *Valentine* and *Bonnell*, testify, that on the afternoon of the 12th of January, 1852, half an hour to an hour before sunset, the deceased called upon them, in New Providence, with a sleigh and pair of black horses, and wanted, first one, and then the other of them, to go with him to Newark. Said he was going there that night to stay with *Isaac Miller*, and that his business was to sell his horses to the plank road company, as he had no hay for them. He offered *Valentine* $5, and *Bonnell* $3 or $5 a day to go with him, but they declined.

Next we find him at Hoyt's, some five miles out of the direct road from New Providence to Newark. That he came there that evening, somewhere between dusk and eight o'clock, with a sleigh and two black horses; that he took tea, remained all night, and went away next morning after breakfast, is proved by the concurrent testimony of *Mrs. Maria*

'oyt, the wife, *Anna*, *Elizabeth*, and *Mary Hoyt*, the hters of Jonathan E. Hoyt, *Charles Kilgee*, the coachman, Patrick and *Sarah O'Shaughnessy*, servants, who resided e family at the time. All except the O'Shaughnessys y that Hoyt was *not at home* when deceased came—that iquired for Hoyt, said he had business with him, and his horses put up for the night before Hoyt returned. swears that he found him there when he returned from New York that evening. *Patrick* testifies that *was at home* when deceased arrived, and *Sarah* says elieves he was at home. *Valentine* says he thinks de- d subsequently told him that he had stayed at Hoyt's ight he had desired witness to go to Newark with him. e is nothing in the evidence to contradict these wit- s upon this point; and it must be taken as an esta- ed fact, that the deceased spent *the night of the* 12*th of* ary, 1852, *at Hoyt's house.*

ien as to the evidence of the execution of the will. *Jona- E. Hoyt*, one of the subscribing witnesses, testifies, in sub- e, that he had no notice or premonition of the intention r. Meeker to execute the will before he found him at ouse that evening. That Meeker then told him he *had to make his will*, or have it executed, and wanted him, t, to witness it. After he had made known his business, Hoyt, *I* invited him into *another room*, and deceased I now want you to witness my will. I asked him if he got his will drawn. He said he had. He then took it of his pocket or pocket-book, and read it to me, and d what I thought of it. I told him I *thought he had very liberally by his wife, taking into consideration her and the property which she already had*, as he said, in own right. I then told him I thought, as he had asked opinion, that he had probably given too much to Mr. lan, although I did not know the value of the property. en asked him if he had not better alter that part of the He said no; if he was to alter it he would give him e, and he wanted no dictation. I then asked him why he

asked my opinion in regard to the will. He said, out of mere courtesy. I then asked him if it would not be more judicious to give his nephew, Jonathan M. Meeker, of Elizabethtown, some part of what he had there given Mr. Boylan. He said no, he had given Jonathan enough, and he would spend, no doubt, what he had given him in his will in a few years; and furthermore, he had a great dislike to his, Jonathan M. Meeker's wife. I then told him that his nephew had named his youngest son after him, and would it not be better to do something for him, and less for Mr. Boylan. He said names did not cost anything, and he wanted no more dictation. I then told him I was not acquainted with any of his legal heirs-at-law, except Mr. Jonathan M. Meeker and Mr. Jonathan M. Muir, and of course I had nothing more to say in behalf of any of his other nephews and nieces, and if he was determined that that should be his will, I would get some one to witness the will with me. After this conversation, we went into the other room, where the family was. I then told him, in the presence of the family, that I thought he had better see Mr. James F. Meeker, of Elizabethtown, and show him the will, and consult him, as he was a gentleman that I had confidence in, and was an old acquaintance of his, and I presumed Mr. Meeker would think as I did with regard to giving Mr. Boylan as much as he had. He said he did not wish to consult any one what he should do with his property—all he wanted was to have the will executed. He spoke of his nephews and nieces in general terms, and seemed to be willing that Mr. Boylan should have, as he said, the lion's share out of his estate, as he always found a comfortable and hospitable home at Mr. Boylan's house, and if property would make him a man, he should have the opportunity. He further said, (this was when we were alone)—he had taken this matter thoroughly into consideration, had made a good many wills, and the last one previous to this he had given his wife but $1000 in her own right, with the use of certain other property; and at the time he made the will, he said he was mad, and he was determined not to give his

wife much; that she had troubled him a good deal when he wished to convey lands, by withholding her name from the deed, and he invariably had to buy her off. I said to him that I thought the will he then wished to execute was altogether more to his credit than the September will. He then said, you refused to witness that will, and now you are not willing to witness this. I told him I thought there were objections, in my mind, to both of them, but I was not willing to witness any man's will that was worth what he said he was, giving his wife only the pitiful sum of $1000 in her own right.

Of the fact of the execution, he says, being shown the paper purporting to be the will, he has seen that paper before; the handwriting of "J. Edwards Hoyt" to the attestation of the will is his. The signature, "Anna Hoyt," to the attestation of the will is hers—he saw her write it. The signature of "Jonathan M. Meeker," signed at the foot of the will, is the handwriting of the testator—he saw him write it. The signatures "Jonathan M. Meeker," on the margin of the several leaves of that will, is testator's—he saw him write the signatures. He says that himself, his daughter Anna, and some or all his family were present at the time; that he started to go for a neighbor, a Mr. Brown, to be a witness; that it was storming, and he did not go; that himself and Anna witnessed the will at testator's request. He describes particularly the manner in which the will was executed—on a portfolio laid on the table—the testator signing it first at the foot; then putting the seal on; testator's putting his two fingers on the seal, and saying, this is my will—I wish you to witness it for the purposes within mentioned; that the attesting witnesses then subscribed their names, and then the testator wrote his name on the margin of the several leaves. He says the attesting clause was written by himself at testator's request; and that after the will was executed, witness enveloped it in a sheet of letter paper, and the testator put it in his pocket-book or pocket. He says the testator read the will once to him in the private room, and once in the

presence of the family on that occasion; that he assigned, as a reason for writing his name on the margins, that it made it stronger, and he had done it before on other wills, and as a reason for coming to Hoyt's to execute it, that he wanted to make a *private will;* that he had made a good many wills, and talked too much about them, and was determined to have one will the world should know nothing about.

Anna Hoyt, the other subscribing witness, details the history of the execution of the will with great particularity. She was the first witness examined. Her account is substantially similar to that subsequently given by her father. She says her father, mother, and two sisters were present at the time; that testator *read over the will in their presence and hearing* before he executed it, and talked about it some time before affixing his signature. That her father told Mr. Meeker he had much better go somewhere else to get it executed. Mr. Meeker said he could have it done nowhere as *privately* as he wished, and it was only at his most urgent solicitations that Mr. Hoyt finally consented. Mr. Hoyt told him he thought he had not been liberal enough with Mrs. Meeker; that Mrs. Meeker had always been very economical, and had done as much to acquire the property as he had. Testator replied, that he had made her a much more liberal allowance than he had made her in a will he had previously made in the autumn; that she was advanced in years, and would have no use for any property long; and at the same time said that he did not come there to have Mr. Hoyt dictate his will; that he knew what to do with his own property without consulting any one; that it was his own property, and he should do what he chose with it. He said that he liked none of his relations; that he liked Mrs. Meeker's much better than his own; that he had had several plans for giving his property away from his relations entirely, but that some of them were in quite needy circumstances, and he had concluded to help them all a little. Mr. Hoyt asked him if he had no brothers or sisters living. He replied that he had one brother who was wealthy, and had only one child,

and that he would give him nothing—that he had enough for himself and his child. Mr. Hoyt asked him what had become of his favorite plan of establishing the *Meeker Institute*, of which he had been always talking. He replied, that he thought it on the whole a foolish plan, and that the money would do his relations more good; that the town of New Providence would never thank him for it after he was dead and gone; that the grass would grow over his grave, and his grave-stone fall before any of them would take the trouble to set it up. Mr. Hoyt told him he thought he had given Mr. Boylan too much. Mr. Meeker said, no more of your dictation; as I told you before, I wish no interference with regard to the disposition of my property from yourself or any one else. I have always thought a great deal of Mr. Boylan; he has always treated me very kindly and hospitably, and is a very promising young man, and I intend to do all that money can to make something of him. He also spoke of Mrs. Boylan, and said she had always treated him with uniform kindness. He spoke of his relations by name, but not knowing them, and having never seen any of them, with one or two exceptions, it would be impossible for me to recollect what he said in regard to them. He said he had twenty or thirty nephews and nieces; that he did not care for any of them; that if there had been any of them equal to Mr. Boylan, he should not have hesitated what to have done with all his property. He spoke of having aided some of his relations; but not knowing them, witness does not recollect with any particularity who they were whom he had aided; that they had always squandered what he had given them, and it had been of no use; that he had no doubt that all he had left them at his decease would be spent in three or four years.

The witness said further, that she saw her father write the clause of attestation; that Mr. Meeker said he had *got the will written in New York*—that he had got some person there to write it, but does not recollect that he mentioned who; that the reason he gave for writing his name on the margin of each sheet was to make the matter sure, so that no one

could mistake it; it was done of his own accord, without any one suggesting it. She says the testator used a gold pen—he tried several before he found one that suited him, and wrote his name several times, so as to show us what a handsome writer he was. He said there were so many young ladies looking at him he must do his best.

To subsequent questions put to the witness, she said—the conversation on the subject of the will, on the evening of its execution, commenced after Mr. Hoyt's return; Mr. Meeker stated in substance, that he had come there on important business—that he had come to have his will executed. Mr. Hoyt told him that he had hoped he would make his will somewhere else, and leave him a handsome legacy. Mr. Meeker replied that he had enough already, and had no idea of doing anything of that kind. Then Mr. Meeker asked Mr. Hoyt if he could not see him in another room for a few minutes. They went into another room and stayed a short time, and returned with the document. The seal was put on the will in her presence; her sister cut it—she saw her do it.

This is the testimony of the two subscribing witnesses as to the execution of the paper, and the circumstances attending it. Then we have the evidence of three other witnesses, who were present at the time. Mrs. Hoyt, the wife, and two other daughters of Mr. Hoyt, Elizabeth and Mary L.

Elizabeth Hoyt testifies that she remembers Mr. Meeker's visit in January; that her father was not at home when he came. When her father returned, *Mr. Meeker told him he* wished to speak to him in private, and they went into another apartment. He told her father he was sorry he did not find him at home on the occasion of a previous visit he had made to the house between Christmas and New Year, and had hoped to have seen him at New Providence. Her father told him he had had no time to go there. They were not long in the room, only a few minutes. They returned to the sitting-room, where the family then were. Mr. Meeker said he wished to have the will which he held in his hand executed. There was some little conversation, and Mr. Meeker sat down

a lamp, and read the will. He read the will aloud. When ead what he had given to Mrs. Meeker, he stopped a ment, and *some one spoke, and said he had done very little her;* that he had not given her half what he ought to have e. He said she had given him a great deal of trouble ut the execution of papers—that she would not sign her ne to papers without some compensation—that it was more n she could spend. He then spoke in regard to a bequest had made to a niece who was deranged. Some one re- rked that he had not given his brother anything; he said brother had enough, more than enough, and that he should give him anything. After he had read what he had given . Boylan, Mr. Hoyt told him he thought he had given him much. Mr. Meeker said he did not come to be dictated There was considerable conversation—a great deal that an't remember. Mr. Hoyt told him he had better take will to Elizabethtown, to a lawyer there, I think by the ne of Meeker, and have it executed there; that he knew hing about his relations, personally or otherwise, and that preferred to have nothing to do with it. Mr. Meeker d he *wished it to be perfectly private;* that if he took it to person Mr. Hoyt designated it would soon be noised oad what he had done with his property, which he did not h. Mr. Hoyt told him he was sorry he had not executed will somewhere else, and given him something. There s some little joking about that, and Mr. Meeker said he d enough already. Mr. Meeker asked which of the young lies would witness the will; he said that it *was necessary t some person besides Mr. Hoyt should witness it*—that *two* tnesses were necessary. Mr. Hoyt said he preferred some rson else should witness it besides one of his daughters, d he started to go for a person living near us—Mr. Brown. hy he did not go I don't remember. My impression is it rmed, or Mr. Meeker objected. I think he asked me if I uld witness it. He said I had the same name as his wife; had a peculiar fancy for the name, and asked me to wit- ss it. I think I had seen more of him than my other sis-

ters. I told him no, and he asked my sister Anna, and consented to do so. I got pens and ink and paper, a pair of scissors, and cut a seal, as he requested me to d had forgotten to state that, before the seal was affixed, Meeker requested my father to write something at the of the paper, which he did. He wrote a few lines. Mr. Meeker took up the pens, examined them, and aske a quill pen. The pens were gold pens, four or five of t I went and got some quills, but no one had a pen-knife. said that he could not write with metallic pens, but prefe quill pens. He wrote his name on a piece of paper se times, until he found a pen which he liked among the pens. He remarked that he could write better than a us. After a while—after some little conversation abou pens—he put his finger upon the seal affixed to the will, said it was his last will and testament for the purposes wi mentioned. It was the usual form, but I have forgotten exact words. My father and sister Anna afterwards w their names. Mr. Meeker wrote his name on the margi the will, whether before or after my father and sister signed their names can't say, don't remember. After the was signed, there was some conversation. *Mr. Meeker it, and put it in his pocket-book*—I should think a poc book; he put it with other papers. I think there was n conversation, after he put the will in his pocket-book, betw him and my father. After the will was executed, he *reque each one of us that we should not mention it to any one.* gave, as a reason, that his relations were always talk about his property, and his disposition of it, and he was termined to keep *one thing from them.*

Mrs. Maria L. Hoyt testifies that she recollects the e cution of the will; that she was present most of the ti it was in the early part of January, 1852, severely c weather and snow on the ground. Mr. Meeker came i sleigh, between sunset and dark; the will was executed tween seven and ten in the evening. He came alone; I him first in our dining-room; he came in with his overc

inquired for Mr. Hoyt; Mr. Hoyt was not at home. He said he was anxious to see him, but gave no reason for wishing to see him. He was told that Mr. Hoyt was expected home soon; and Mr. H. did come about seven o'clock—my impression is he, Hoyt, had been to New York. Think testator took tea with the family. From his arrival until Mr. Hoyt came home he was in the dining-room seated, talking with the family. He had been relieved of his overcoat, and his horses taken to the stable before Mr. Hoyt returned, and he had said he should stay all night, and had given directions about his horses, and his blankets in particular, not to have them put on the horses, as they were new. He said he considered his horses *sold to the plank road company.* He requested a private interview with Mr. Hoyt as soon as he came in, or not long after; they went into what we call our winter parlor, and were there for a time, can't say how long, should not think more than half an hour. They then came out with a paper, which I understood from Mr. Meeker was a will. Mr. Meeker had the paper. He had on, or put on his spectacles, and read it aloud. I did not hear it all, as I was out of the room once or twice, but I heard the most of it. He signed his name after the will was read. My daughter Elizabeth prepared a seal in my presence and in the presence of us all, and he declared the will to be his will. Mr. Hoyt and my daughter Anna witnessed it. Mr. Hoyt, I think, wrote something at the bottom of it—I don't know what it was—it was written at Mr. Meeker's request. I objected to either of my daughters witnessing it. Mr. Hoyt started for a neighbor of ours—Mr. Brown; for some reason or other he did not go; it was snowing, I think, quite fast. There was considerable discussion about the different bequests. Mr. Hoyt and my daughter Anna witnessed the will at Mr. Meeker's request. He, Meeker, signed it, I think, more than once; on the margin of some or all the leaves, besides at the foot. Mr. Hoyt, myself, and three daughters, Mary, Anna, and Elizabeth, were present. I was not present all the time it was being read—I was while it was executed;

the others were present during the time, as far as I know. There was considerable conversation in regard to the pen; he did not like the gold pen, he liked quill pens best. He said he was a good writer—could write better than any of us. I don't recollect all the discussion (about the will), because I did not know the parties. I told him I thought he ought to be liberal with Mrs. Meeker, as there were no children. He said he had given her more than she would ever want; he said she had a good deal of her own; he said they had always had separate interests, and he had been obliged to give her from time to time to get her to sign his papers; he spoke, while reading over the paper, about the niece he had that had been deranged; he said she was in the Retreat, I think; I don't remember her name; I think he said she was a daughter of his sister; he mentioned her name while reading over the bequest to her. He spoke also of a niece of his wife—I think her name was Tully—said she would probably be Mrs. Meeker's heir; he said he liked her very much; he mentioned several other of his relatives as he read, but I don't remember their names. He said he had thought of giving money to a *seminary or institute*, but I *understood he had relinquished the idea*, but did not wish the people of New Providence to know it; he said he had given them some encouragement for such an institution, and they would be angry if he did not—would make it uncomfortable for him—be angry enough to ride him on a rail. I think there was a *provision in favor of D. K. Boylan;* Mr. Hoyt rather insinuated that he thought he was pretty liberal with him; testator said he thought Mr. Boylan was a very fine young man, and he wanted he should have a good start in the world. He rather resented suggestions made by Mr. Hoyt in regard to the will, and seemed to think he knew what to do with his own better than other people could tell him. Recollects there was a provision in the will for Jonathan M. Meeker, jun.; heard him speak about that before. He said he had acquired a large property, and now there was *no one to give it to that he cared for in particular*, to whom he would like to give the

it. In speaking of Jonathan M. Meeker, jun., the
of his, he said he had received many kindnesses and
sistance from his father in early life, and liked him
l, but *did not like his wife.* He said he would give,
given him something handsome. She thinks, *when*
was executed, the testator put it in his pocket-book.
E. Hoyt is the last witness examined in reference
ecution of the will. She is a daughter of Jonathan
and says she was present at the time. That testator
ne with a sleigh and two horses about dusk; that as
he came in he sent word to the man who took his
ot to put the blankets on them, and said he con-
hem as *good as sold.* Her father was not at home.
inquired for him—took off his overcoat—warmed
at the register—took tea—and said he was anxious
r. Hoyt, and had business of great importance, which
attended to at once. When Mr. Hoyt returned, *tes-*
d he wished to see him on business, and they retired
er room, the winter parlor, at *testator's request*—
ent perhaps fifteen minutes—the room was warm—
a light with them. They returned together. Tes-
n had a paper in his hand, said it was a will which
d to have executed. He sat down at the table, and
loud; my father, mother, two sisters, Elizabeth and
id myself were present. The paper was then exe-
our presence, about seven o'clock. I saw testator
name on the bottom of the page and on the margin
aves. After he had put his name to the bottom of
, he put his hand on the seal, and said it was his
and testament for the purposes therein mentioned.
was then witnessed by my father and sister Anna
or's request. I think they witnessed it before the
es were made in the margin. He said he made those
es that there might be no mistake about it. He used
c pen—tried it several times on a piece of paper—
was a good writer, and could write better than any
he execution of the will and the conversations about

it occupied *an hour and a half or two hours.* He asked my sister Elizabeth first to witness the will; she objected; my father proposed some one should be called in out of the family; he objected to that—said he wished it to be kept private, and preferred one of the others to witness it—asked my sister Anna, and she did it. My father started for a Mr. Brown to witness it—Meeker was opposed, and it stormed at the time. Father had been to New York that day. The testator *read the entire will, as far as I know.* After it was executed, *he put it in his pocket.* Father wrote a few lines just before the signing of the will, at the end of it, at testator's request. I saw the signatures of father and Anna at the time they were made. We were all sitting at the table in the centre of the dining-room. Looking at the paper, she says the clause beginning "in witness," &c., is her father's—she saw him write it. I saw the signatures of Jonathan M. Meeker, J. Edwards Hoyt, and Anna Hoyt made.

We have, then, the testimony of five witnesses to the *fact* of the execution of a will by the testator on the 12th January, the day of the date of the attestation. True, the credit of one of them, J. Edwards Hoyt, is seriously impaired by evidence in the cause, but the other four are in no wise impeached. They narrate all that occurred, and much that was said on the occasion, with great particularity. Their statements in the main corroborate each other. I can discover no discrepancies, indeed, which might not be expected naturally to exist in the recollection of five persons as to a series of acts and conversations and circumstances occurring several months before the examinations took place. That Meeker was at the house of Hoyt at the time cannot be questioned. In themselves, considered apart from all the other facts and circumstances in the cause, there is nothing in the narrations given by these witnesses which strikes the mind as extraordinary or unnatural.

It is difficult to imagine how the *fact* of the execution of a *will could be* more directly and positively proved. There seems to be no reasonable ground to doubt that *a will* w—

by the testator at the house of Jonathan E. Hoyt on
ng of the 12th January, 1852. In such statements
re here, with all these circumstances, these details,
ıutiæ, this corroboration, and this compactness and
ıt as a whole, I repeat *there can be no doubt* as to
ıf the execution of some such paper as the one now
ɔn by the testator on the occasion referred to.
; it, then, as a fact clearly established in the cause
ıce, the force of which cannot be resisted—that *a*
executed—

ass next, in the order in which I propose to examine
ect, to the question: *Was Jonathan M. Meeker, at*
of the alleged execution, of sound and disposing
mory, and understanding?
umber of witnesses were examined upon this point.
ɔart of the caveators, witnesses testify that, in the
rt of testator's life, in their opinion, his *mind was*
h impaired, so much so that they think he was not
t to conduct his own business; that his memory
l to a great extent; that sometimes he was unable
money or calculate with accuracy; sometimes in
ion he appeared insane or childish; for six months
s death (he died in May, 1852,) his health went
h body and mind. In the latter part of November,
December, 1851, Mr. Brookfield had an interview
, and thinks that at that time he was not of sound
capable of attending to business. He was some-
ublesome in business matters. Once made a propo-
Mr. Valentine in reference to his, testator's, wife,
licated insanity, if intended seriously. In conver-
would fly from one thing to another—his discourse
l—not totally beside himself, but childish—had no
self-control on subjects that excited him—was som-
fectly infuriated on such subjects. Letters and pa-
is handwriting are produced which indicate that his
ı at times little better than a chaos of confused ideas,

while other papers—the will, particularly of September, 1852, show that at other times he understood himself very well, and could express his thoughts intelligibly on paper.

2. He is shown to have entertained many *visionary ideas*. He endeavored to persuade Jotham Potter that money could be made by erecting a *factory* on a small stream which in a wet time ran down the side of a steep hill, but the bed of which was dry in common times. He would buy *stock* sometimes, and offer to sell it, *as he said*, for less than cost, admitting that he did not know why he purchased it; that immediately after doing so, he saw he was injuring himself, and sometimes *thought himself that he was not fit to do business;* he talked very extravagantly about the natural advantages of *New Providence*, and how it might be made a great city; he very often put an absurd *valuation* on his property, and sometimes offered to give away property; he had an idea that a great water-power could be created by tunnelling *Long-hill* and draining the great swamp, and had very extravagant notions of the feasibility of such a project and its results. On one occasion, he called on Mr. Brookfield, of Morristown (one of the commissioners), to complain that the books of subscription to the stock of a contemplated railroad from Elizabethtown to Morristown had not been opened—was quite excited about it, and Mr. Brookfield had to assure him the books should be opened, at a particular time and place, to appease him; he said he would be there, and if the stock was not all taken in two hours he would take it himself. It would, the witness supposed, have taken $300,000 to build the road. When the time appointed came, the testator did not attend. He would say that his wife had royal blood in her veins, was related to the reigning family of England, and ought to be on the throne; talked of a vision he had about it, and of going to New York to have it written out. Proposed to bet Mr. Corey $1000 that he would raise 2600 bushels of corn on about ten acres of land; told him he believed he had a lizard in him, his mouth was so bitter; talked to Mr. Minton, of Chatham, about building a ro[illegible]

round a mill-pond, and putting a steamboat in it, and said he thought people from New York would patronize it, and said very many strange, idle, and foolish things.

3. On subjects of an exciting character he had become very violent and unreasonable. An act was passed, in 1850, authorizing the common council of Newark to take lands for public parks, and the council having taken some of his lands for that purpose, he was extremely exasperated, and denounced without stint or measure the law and council and everybody that had anything to do with the measure, and often talked and acted in reference to that subject wildly and irrationally—"wild as wild could be," as some of the witnesses express it. He thought the act unconstitutional; that the conduct of the council was good cause for revolution——better than the colonies had—and sometimes talked largely of raising one—threatened to flog one of the aldermen, and whip the whole council; came to the legislature to get the law repealed in the winter and spring of 1852, and annoyed everybody he met exceedingly by his obtrusiveness, irritability, and childishness; applied to a printer, Mr. Hull, to print a pamphlet for him on the subject, and offered to pay any price for it, which Mr. Hull declined, thinking him not in his right mind. On the subject of taking his land for a park, several witnesses, members of the legislature and others, say his mind was so much excited that he could not be called sane in their opinion, and many facts and circumstances in regard to his conduct in that matter are detailed, which undoubtedly furnish strong ground for such a conclusion. He offered to give McCormick a large part of the park lot if he would build an arcade or bulkhead there. His valuation of his lot at $20,000, far more than it was really worth; his offer to give Amos Wilcox somebody's note for $1000 as a present; his affirming, on one occasion, that he could get 500,000 people in Newark to sign a remonstrance against the law respecting parks, and similar indications of a wild recklessness in conversation, are exhibited in the testimony. And it is in evidence that from the time the trouble about

the park began seriously to affect him, his health and strength, both of mind and body, gradually failed.

Such is substantially the scope of the evidence adduced by the caveators to prove that, on the 12th of January, 1852, the testator was incompetent to make a will. I am of opinion that the evidence does substantially establish the proposition, that there were periods, during the winter of 1851-2, in which the deceased was *not* of sound and disposing mind and memory—periods in which his faculties were so much impaired as that he had no rational comprehension of the subject matter with which he dealt—in which he might have done, in reference to the disposition of his property, what his returning reason and judgment would not have sanctioned—periods in which he might have been made the victim of an artifice by one who had carefully studied the character and condition of his mind, and in whose way he had happened to fall at a time favorable for such an attempt.

It must, however, be admitted that this was not by any means the *habitual* condition of the deceased's mind during the last year of his life, embracing the winter of 1851–2. And it is a most important fact in this cause that in the opinion of the subscribing witnesses to the will, and of the others who were present at its execution, the deceased was of sound mind *at the time* of the execution. Speaking of his condition on the evening of the 12th January, *Jonathan E. Hoyt* says the deceased understood what he was about; considered him a sharp, shrewd man; saw no difference as to his mind, memory, and understanding from what he had been when he first knew him. *Anna Hoyt* says "he was of good capacity and understanding." *Elizabeth Hoyt* says "from what she saw of him at the time the will was executed, he was of sound disposing mind and memory." *Mary L. Hoyt* says that at the time he appeared sound for aught she saw—she saw nothing that led her to doubt or suspect the soundness of his mind—he appeared calm, composed, and conversed as usual. *Mary E. Hoyt* says she saw nothing at the execution of the will but what was in perfect keeping

with his former conduct and character—he seemed to understand fully the nature of the instrument he was executing—she considered him of sound mind—saw nothing to the contrary—he was perfectly calm and composed, and remarked upon the different provisions of the will as he read it aloud, &c. There is, too, much testimony as to his *ordinary* state of mind of a favorable character. *Mr. Harriot*, in November or December, 1851, went with testator to the common council, when the (to him) exciting subject of the appropriation of his property for a park was before them, and testator was endeavoring to get the aldermen to protest against their final action, and says he was perfectly coherent and sane—mind not off its balance in the least—appeared as he had for three or four years—always thought him a shrewd man. The same opinions substantially as to his state of mind, in the winter and spring of 1851–2, are expressed by *Archibald Woodruff*, *William Johnson*, and some twenty others of his neighbors and acquaintances, among whom are Doct. Pierson and Doct. Darcy, gentlemen not likely to be deceived on such a subject with their opportunities of judging. *Doct. Pierson* says, "I always considered testator of a peculiar temperament of mind—he was very opinionative and very tenacious of his own views, and seemed to get readily excited if others did not think as he did on every and on any subject. He seemed to think himself always as certainly correct in his own views of a subject, and that others ought to yield to him if they differed from him. I have never discovered any want of understanding or mental capacity." *Doct. Darcy* speaks of his situation in February, 1852, when he came to Trenton in reference to the law respecting the Newark parks; talked with him, and says he did not discover that he was any way deficient in the state of his mind—was the same as formerly, except what might naturally arise from a person of his make of mind owing to advanced years.

It is in evidence that, up to the period of his last sickness, he was in the habit of attending to and transacting his own business—bought and sold—collected and loaned out money

—gave directions to his lawyers about the conduct of his legal business—travelled a good deal from home—and no instance is produced, in the history of his business transactions, of his making a foolish bargain with anybody, or sacrificing any of his property or interests in the latter part of his life. His visionary ideas exhibited themselves in *talking* rather than in *acting*—he talked of the profit of such enterprises as building factories on wet weather streams, or putting steamboats in mill-ponds, or tunnelling Long-hill, but he never put his own hand to any such enterprises; he said he would take the whole stock of a railroad company, and build the road, but he did not take a share; he proposed bets and made offers to give away property, but he made no bets and gave no property without an equivalent. Nor do I think the evidence establishes the fact, that there was positive mental *delusion* even in his wildest extravagancies. He did not fancy things to exist which *did not* exist, and could not by any possibility have an existence in the nature of things. Many opinions to which he gave expression in serious moods might be opinions against reasonable probability; but error in judgment, in opinion, in belief, is not *delusion*. That a water-power *might* be created by tunnelling Long-hill—that a pond of several acres might be beautified and made attractive—was true; the first was a project others had thought of as well as Mr. Meeker. Mr. Potter *had* a stream on his land which in wet weather would turn a mill. The appropriation of his land for a public park was a fact. There was, it seems, some old tradition that the Townley family from whom his wife descended, was related to the royal blood of England—a dream it might be, but it did not originate in his mind.

Now all this evidence, taken together, can hardly be considered, I think, as going further than to establish the fact that there were *occasions* when his conversation and conduct were inconsistent with what might be expected in a man of sound intellect. But when the intellect is impaired at all, the question as to the extent of capacity remaining becomes of

e most difficult of all questions to deal with; and when we alled upon to form an opinion as to the mental condition man from his conduct and conversations, it is essential we should understand, if we can, the original character- of the mind we are contemplating, in order that we compare the mental phenomena relied upon to establish ity, with that exhibited when the subject was confessedly

cording to the testimony of witnesses who had known estator a long time, he was a man of singularly marked acteristics. He was generally esteemed as possessing than ordinary strength of mind—shrewd, sharp, of t mental and physical activity; exacting, avaricious, vering, determined, and obstinate. His property and s were generally his principal topics of conversation— as boastful of his wealth, power, capacity, and informa-

Was very talkative—talked very largely, told strange es about the products of his farming operations—talked ly of public improvements and schemes. Had a high on of his legal knowledge—was habitually dictatorial, pursued his purposes with indomitable energy. Was r visionary in his cast of mind—and more in the habit uggesting visionary projects than attempting them. e was, one witness intimates, a good deal of what is called *bug* in his conversation, and this appeared to increase rapidly for two or three of the last years of his life. was," says Mr. Magee, "a curious man, and it wanted ser head than mine to understand him always." "He ' says Mr. Dougherty, "peculiar ways with him, which would have to become acquainted with him in order to erstand." He had as many projects for making money improvements, and talked as largely as any man you d find." He was a man of strong prejudices and passions mpulsive, irritable, ungovernable in his temper, and when voked his resentment knew no bounds—and all these racteristics became more prominent as age and debility pt on.

Now, comparing the evidence as to the testator's general character of mind with what is detailed of his conduct and conversations about the time of the execution of this will, and looking at the circumstances which were present and operating with their influences upon him—advanced age, enfeebled from physical disease, irritated extremely by the proceedings of the Newark councils in taking his lands under what he thought an unconstitutional law, I confess I am unable to reach the conclusion that he had what may be called a uniform capacity. Indeed, while the weight of evidence is, I think, clearly in favor of his capacity when in ordinary health and free from causes of excitement, yet it was no doubt to some extent a *fluctuating capacity*, greatly impaired at times, and occasionally sinking into the imbecility of second childhood.

But as the case stands here upon the question of the *competency of the deceased at the time of the execution*, I have no hesitation in saying, upon the evidence before the court, that his competency is proved.

III. The question of identity remains. *Is the paper propounded for probate the same will which was executed by the testator on the* 12*th of January?*

The caveators take the ground, that however conclusive the proof may be that a *will* was executed by the deceased at Hoyt's, and though he may have been sane at the time, yet that *this paper cannot be his last will and testament*. That there is overwhelming evidence to show that he always considered, spoke of, and acted upon the provisions of another will as his last will, that there are strong grounds to believe that this paper is not genuine, and that if a will was executed by him at Hoyt's it was subsequently destroyed.

This, it seems to me, is really the only question of serious doubt in the cause, and it demands a careful consideration.

It will be remembered that the witnesses who testify to the execution of a will at Mr. Hoyt's on the 12th of January

all agree that after the paper had been executed, the testator put it in his pocket or pocket-book.

No witness except Jonathan E. Hoyt testifies to having again seen this paper until early in June, after the testator's decease.

Jonathan E. Hoyt says, that on the evening of the 12th, before retiring, the testator requested him to take and keep the will, which he reluctantly consented to do; that they breakfasted next morning about nine o'clock; that before leaving, the testator said *he would like to take the will with him, in order to show it to some friend or friends*, and that *he gave it to him.*

No witness is produced, however, to whom the deceased *ever showed such a will.*

Mr. Hoyt testifies that the deceased afterwards *brought the will back to him;* that he enveloped and endorsed it, and put it away with his own papers. The envelope, so endorsed, was seen by the other witnesses who were members of his family, but the paper endorsed was not seen by any of them until June.

Anna Hoyt says she next saw the will, meaning the *envelope*, after its execution, in Mr. Hoyt's desk, and recognized it when it was taken from the envelope and opened according to the directions on the envelope. When she first saw it in her father's desk it was enveloped, and had written on it "Jonathan M. Meeker's will," and the time it was to be opened. The envelope being shown her, she recognized it as the same. Ten days, as she understood, after Mr. Meeker's death (which would be the second of June) the will was opened and read in the presence of the witness and the other members of Mr. Hoyt's family, at Mr. Hoyt's house, and by him —*none but the family being present.* Witness looked at it—cast her eye over it at the time, but did not read it entirely. She was in the room when it was opened, but don't recollect seeing the seal broken. She never saw the will from the time Mr. Meeker put it in his pocket-book until she saw the envelope in Mr. Hoyt's desk; *when the envelope was removed*

from the will she recognized it as the same document she had witnessed.

Elizabeth Hoyt says she knew the will was in her father's possession for some months previous to testator's death—all the family knew it. She had seen it in the envelope (that is she had seen the envelope). She recognized the envelope shown to her. It was among her father's papers, and she had seen it whenever she arranged them. That her father was about taking it with him to Mr. Meeker's funeral to give it to Mrs. Meeker, but being reminded of testator's directions, he changed his mind. That six, seven, or perhaps ten days after the decease, *her father broke the envelope* in witness's presence and read the will, and said he was going to take it to the surrogate, and requested witness to write to Mrs. Meeker informing her of the fact, which she did. It was the same will she had seen executed.

Mrs. Maria L. Hoyt says she saw the envelope, in which the will was several weeks after the execution, with Mr. Hoyt's papers. She identifies the will produced as the one she saw executed, and thinks the envelope is the same. When she saw the envelope it was sealed. Thinks it was opened and read at her house on the day it was taken to the surrogate's office. As *far as she heard and recollects* the contents of the will, they are the same as read by the testator at the time of the execution. Upon reading the will now, witness has no doubt it is the same read at her house. She says she recollects, and gives the reasons why she recollects, *several* of the bequests mentioned.

Mary E. Hoyt says she *should think*, from the appearance this is the same paper—the same handwriting in the body of it. She saw the will taken from the envelope, eight or ten days after Mr. Meeker's death, by her father, and heard him read it. Its contents appeared the same that testator read. She had seen the envelope once in her father's drawer. She saw the seal of the envelope broken.

This is, in substance, all the direct evidence we have in relation to the question of the identity of this paper with

·hich was executed by the testator at Mr. Hoyt's, and at the time he took away with him. I have already ıat no witness but Mr. Hoyt himself proves the fact of ɜtator's returning the paper to him—all that the other ıses know is, that they saw an envelope afterwards ; Mr. Hoyt's papers, which, as they understood and ed, contained that paper, and that when, after the tes- ; death, Mr. Hoyt broke the seal of this envelope, and ted the paper it contained, and read it to the members family, they believed it to be the same paper—and ertainly speak with confidence as to its being the same

A period of nearly five months had however elapsed :hey had seen the will executed.

are then to consider the evidence produced on the f the caveators below in opposition to the conclusion his paper is the last will of the testator.

And first, it is insisted that the place where this will is d to have been deposited, and from whence it is pro- , is calculated to cause suspicion. It was never seen ırd of by anybody out of the Hoyt family, as far as is nly known, until several days after the testator's death. ne but Jonathan E. Hoyt testifies to having seen *this* between the 12th of January and the 1st of June. It is ɔroduced by Mr. Hoyt as the will executed by the tes- at his house, in the presence of himself, his wife, and daughters, on the night of the day it bears date. And *hould this paper have been deposited with Hoyt*, is sig- ntly asked. There is certainly nothing in the cause to e the belief that the deceased was *particularly intimate* Mr. Hoyt, and there is some testimony to show that he *ısted him*. It seems that, on one occasion, Hoyt had ısed to lend deceased a large sum of money at a low ɔf interest—afterwards offered to lend him $1000 with- ıterest for a year, and it ended in his handing deceased for which he, Hoyt, took his note ; that Hoyt also bought ' of deceased for $27, took a bill of sale, gave his note ıe money, and left the cow, and deceased became suspi-

cious that there was some design in thus obtaining his note and bill of sale, and became anxious to get up his paper from Hoyt—refused to lend him money, and wrote to Jonathan M. Meeker to go with him to Hoyt's on the 27th December, 1851, and "try to settle my business with him," as he expressed it. It seems that deceased did go there about that time, and stayed all night and part of next day without seeing Mr. Hoyt, who was from home; that on the 10th of January, he sent Hoyt's note to his house by Mr. Wilcox, with a request to have his own note in exchange, but Wilcox found Mr. Hoyt was absent, and returned the note to him, as he thinks, the next Monday, but is not sure it was the 12th; and it is argued that deceased would scarcely have trusted Mr. Hoyt with the custody of his will, if he was so suspicious of his character as to be afraid to trust him with papers that had his signature.

2. In the second place, it is insisted that the *conduct* of *J. Edwards Hoyt*, before, at the time, and after the alleged execution of the will, furnishes ground for just suspicion of fraud; that his gratuitous offers to lend Mr. Meeker large sums of money, his getting his note for $30, and a bill of sale of a cow, which he did not eventually take away, were schemes to win the deceased's confidence and get his signatures. It appears, by Mr. Hoyt's testimony, that he spent a night at the deceased's in March, 1852, and on that occasion, he says, the deceased took him into a room, and read parts of several old wills he had made, and that Hoyt then prepared a new will for him, and this, counsel insist, was contrived by Hoyt, and is another link in the chain of evidence to prove that he was possessing himself with the materials out of which to make a surreptitious will.

Again, it is proved that, in the winter of 1851-2, Mr. Hoyt, applied to Murray, assessor of one of the Newark wards, to find out, as he said, the value of the testator's property in that ward, and obtained from him a statement of all his real property in Newark, with its location and character. This is adduced as another link in the same chain. And as

it appears that the deceased had once offered to sell Hoyt his Ohio lands, and Hoyt knew what his real estate in New Providence consisted of; that with this information from Murray, he was in possession of knowledge of all the real estate of the deceased which is mentioned in the will of January 12th.

Then we have the evidence of Mr. Carr, that about the 10th of March, 1852, he saw a paper in Mr. D. K. Boylan's office in Newark, endorsed "Jonathan M. Meeker's will;" that he opened it, and read the commencement, "In the name of God, amen. I, Jonathan M. Meeker, of the township of New Providence," &c.; that Boylan and Hoyt came in; Boylan took the paper, and went, or said he was going to New York, and he and Hoyt went out together. Carr's character is assailed, but Mr. Samuel Wilcox testifies that he mentioned this circumstance to him soon after. Again, Mr. Hoyt admits he had made inquiry as to whether Boylan's word could be relied on—thinks it was after testator's death; but gives a singular reason for doing so, to wit, that Mr. Meeker had remarked to him, at the execution of the will or after that Mr. Boylan, *being executor, would have to get some one to give bonds for him*, and asked him, Hoyt, if he would do it, and that Boylan had applied to him, as he supposed, for the same purpose; whereas both Meeker and Boylan must have known that executors are not required to give bonds.

Again, Mr. Hoyt states, in his testimony, that he never informed Mr. Boylan of the existence of this will previous to the eleventh day after testator's death, and yet Mr. Parsons testifies that, in *less than a week* after Meeker's death, Mr. Boylan came to the surrogate's office, informed him of Meeker's death, inquired when caveats must be filed, and said he *was an executor* in Meeker's will; though he had been at the funeral, heard the September will read, and therefore knew he was not an executor in *that will*. Some stress is laid, too, upon another fact. The testator died on the 22d of May. On the morning of that day, Hoyt says he was in Newark,

on his way to New York, and met Boylan, who told him Mr. Meeker had been quite sick, and *made an appointment* with him to call at his, Hoyt's, house that evening, on his return from New York, *and take him up to Meeker's.* Boylan did call, according to appointment, and Hoyt went with him to Meeker's, and found him dead. Vanderveer testifies that, on that day, Boylan hired a wagon of him to go to *Daniel Pearson's;* that he did not return until about two o'clock at night—and told him subsequently, that on his way to Pearson's, where he was going to a *party,* he met a messenger, who told him Mr. Meeker was very low, and was not expected to live, and he went there. The fact is there was no party at Pearson's that night, and the wagon was undoubtedly hired to go to Meeker's, according to the appointment made with Hoyt. Why, it is asked, is this equivocation—why does Mr. Boylan conceal, on the 22d, the fact that he is going to Meeker's? Why does he arrange with Hoyt to go with him, if he at the time knew nothing of this paper? Mr. Hoyt had the will in his pocket, as he says, at this visit, and went, intending to get rid of it, but finding Mr. Meeker dead, he took it back with him, saying nothing to Mr. Boylan about it.

3. In the third place, it is urged that *suspicion attaches to this paper itself.* It has never been discovered who prepared it—it is in a handwriting unknown; some of the witnesses present at the execution testify that the testator said he had it drawn in New York or Newark, but though the question of probate was in litigation for a year before the Orphans Court at Newark, and the testimony of the draftsman would have been of vital importance—probably absolutely decisive—*he has not been found,* nor does it appear that any effort was made to find him.

Again, it is in evidence that the deceased had drawn several previous wills himself, some of which are produced, and [redacted] yet, excepting the name, "Jonathan M. Meeker," signed at the foot and on the margin of the three half sheets which [redacted] purpose it, there is not a word in or about this paper which [redacted] tended to be in decedent's handwriting. There is

contrariety of evidence as to the genuineness of the signatures of the deceased's name—they are made better than he usually wrote in the latter part of his life—but it is impossible to say with certainty, upon the evidence or upon inspection, whether they are genuine or not. I pass by two or three slight alterations apparent on the face of the paper. I do not see that anything can be inferred from them which will very materially affect this question. There is one name in it—Halsey Meeker—which in all the other wills is written Caleb H. Meeker; but if the January will was written from the dictation of the deceased by a stranger this error may readily have occurred, as the deceased sometimes called him *Halsey*—and the same remark may be made as to the alterations apparent.

4. In the *fourth* place, after the death of the testator, a will, drawn by himself, attested the *25th September*, 1851, and duly executed, was found uncancelled in the testator's desk at his dwelling house. It is written on twelve pages of foolscap—manifestly prepared with great labor and care. All the wills previously made were either destroyed, cancelled, or mutilated, showing testator's habit when he made a new will. This will was executed less than *four months* prior to the date of the paper offered for probate. It makes several *very different dispositions of the testator's property* from this, showing, if this will be genuine, that the deceased's mind had undergone, in that short period of time, a change, in this respect, to certainly a remarkable extent. For example:

1. The *September will* gives Mrs. Meeker, his widow, his farm and forty acres of woodland, stock and furniture *for life*, $1000 in cash, and $400 a year, in lieu of dower. In this paper she has the farm, stock, furniture, &c., absolutely, and $4000 in cash, without barring her dower.

2. The *September will* gives his nephew, Jonathan M. Muir, the above farm and land, after his widow's death, for his life, then to his children, &c. In this paper he has a house and lot in Newark and $1000, &c.

3. The *September will* gives John Meeker, Deborah Hand, Daniel H. Meeker, Isaac Meeker, Theodore and Joseph Wilcox, Josiah F. Muir, Caleb M. Muir, Jonathan M. Noe, Jonathan M. Pierson, Jonathan M. Fisher, Deborah Muir, and Mary Muir, each, specific legacies. In this *paper* they are not mentioned by name at all.

4. In the *September will*, eighteen lots of land and $5000, and the interest of $5000 more, are given for the Meeker Seminary. In this paper he is made to say he has changed his mind, and gives nothing for such an institution.

5. In this *paper* $500 is given to A. C. M. Pennington, $500 to O. S. Halsted, jun., $300 to Richard Townley, $1000 to the Methodist Church at New Providence, $500 to the Central Methodist Church at Newark, and property, variously estimated at from $12,500 to $20,000, to D. K. Boylan, none of which legacies are found in the *September will*.

6. In the *September will*, his widow, James T. Meeker, Jonathan M. Muir, and Isaac Meeker, jun., are executors. In this *paper* D. K. Boylan and the widow are executors.

7. The *September will* goes into great detail, contains numerous directions to his executors, advice to his legatees, and couples many of the legacies with limitations and conditions, and I believe mentions every piece of property he owned. This *paper* contains nothing of this kind, except a desire that his widow should occupy the homestead, &c., and omits entirely the Morris county land. No one can read these two instruments without being forcibly struck with this difference. Not a trace of the peculiarities of mind, which appear on every page and in almost every line of the September will, is to be discovered in *the paper* here produced. And the same striking dissimilarity is apparent between this paper and all the previous wills drawn by or for the testator. It is a fact, however, to be remembered in this connection that the testimony of the ladies of Mr. Hoyt's family shows that several of these dispositions *were* contained in the will executed in January.

8. Again, it is argued that the January will is an

natural will, inasmuch as it diverts a large proportion of the estate from the blood relations of the testator, contrary to the long settled intention of the testator, as indicated by former wills. This paper, when compared with three former wills, one in 1846, one in 1848, and the September will of 1851, to some extent furnishes ground for the argument, but there is not much substance in this objection when examined closely. The legacy to *Boylan* is probably not much greater or less in value than that in the other three wills given to found the *Meeker Institute*, and the January will does not give a greater proportion of the estate to strangers, including charities and to Mrs. Meeker and her relations, than some of the other wills; for it is important to remember here, that though this paper omits to mention most of the testator's nephews and nieces by name, and gives them no specific legacies, yet the entire *residue* of the testator's estate, which he says will amount to a very large sum, is given to those of them who are not otherwise provided for in the will. A tabular statement of the dispositions of the four wills will show at one view how the facts are. I give merely the substance of the different bequests and devises, omitting descriptions, values, conditions, and limitations annexed to them, &c.

Legatees. Meeker blood, principally nephews and nieces of testator.	*Will of* 1846.	*Will of* 1848.	*Will of Sept.*, 1851.	*Will of Jan'y*, 1852.
Jno. Meeker	House and lot	House and lot and $3000...	House and lot	.....
Deb. Hand	House and lot	House and lot and $2000...	House and lot	....
Daniel H. Meeker	$500	$2500	$500	.....
Phœbe Roberts	$100 a year	Farm	Int. of $2000,	Int. of $2000.
Abij. Pierson	Ohio farm	Ohio farm & $6000	Ohio farm	Ohio farm.
C. H. Meeker	House and lot	House, lot, & $2000	House and lot	House, lot, & $500.
Almira Meeker	$100	.....	.....	.....
Fred. Meeker	Lot of land	.....	.....	.....
Jona. M. Meeker	House & lots,	House, store, & $3000	House and lot	House, lot, & $2000.
Isaac Meeker, nephew	Land, 23 a., &c.	Lots & $2000	Lots as before	.....

Boylan *v.* Meeker.

Legatees.	*Will of* 1846.	*Will of* 1848.	*Will of Sept.*, 1851.	*Will of Jan'y*, 1852.
Theodore and Jos. Wilcox	House and lot	House, lot, & $1000	House and lot	
Jona. M. Muir	Farm at N. P., &c.	House, lot, & $5000	Farm at N. P., after widow's dec., & $2000, and 40 a. lot,	House, lot, & $1000.
Josiah F. Muir	$1000	$4000	$1000	
Caleb Muir	House & store	House, store, & $2000	House & store	
Deb. Muir	House, lots, & $200	House, lot, & $1000	House and lot	
Mary Muir	House, lots, & $200	House, lot, & $1000	House and lot	
Albert Meeker	Lot of land			
Jona. M. Noe	Lots of land	Lot of land	40 a. in Morris co.	
Jona. M. Pierson,	Lot	Lot	10 acres	
Jon. M. Fisher	6 acres	7 acres	7 acres	
I. Meeker, brother		$3000		
Jas. F. Meeker, of Elizabethtown,				$500.
Mrs. Meeker and her blood.				
The widow	House in New ark and $400 per annum	Farm at N. P. and $5000	Farm at N. P. for life, 40 a. lot, $400 per an., & $1000,	Farm at N. P. and $4000.
Rich'd Crane	Lot of land			
David A. Crane	House and lot			
Jos. W. Crane	Lot of land			
Jon. T. Crane	Lot of land			
Agnes Tully	Lot of land			$1000.
Clark Townley's children	60 acres			
Harriet Crane	$200	$200		
Rich'd Townley		$500		$300.
To strangers.				
The girl Violette,	House and lot and $150	House and 25 acres	House, lot, & $200	Int. of $5
A. Whitehead, for services	$1500			
David Johnson, son of J. A. J.		$500		
Jno. A. Johnson				$500.
A. C. M. Pennington				$500.
O. S. Halsted, jun.				$500.
Isaac Miller				$500.
[illegible] Boylan				Property in ark, estimat from $12,5 $20,000.

Boylan *v.* Meeker.

Legatees.	*Will of* 1846.	*Will of* 1848.	*Will of Sept.*, 1851.	*Will of Jan'y*, 1852.
Charities.				
Franklin st. Ch., Newark	$300	$200		
Meeker Institute,	Land & $10,000	Land & $10,000	Land & $10,000	
Pres. Ch., N. P.		$1000		
Meth. Ch., N. P.		$1000		$1000.
Cent. Meth. Ch., Newark				$500.
Residue	Testator's nieces and nephews	Testator's nieces and nephews and some relatives of Mrs. M.	Nieces and nephews of testator and his wife	Testator's nieces and nephews not before provided for in the will.

It will be seen, by examining this statement, that the legacy given to David Johnson, by the will of 1848, is given to his father in this paper; that, with this exception, the only legatees in this paper, not mentioned in *any* of the former wills, are A. C. M. Pennington, O. S. Halsted, jun., Isaac Miller, and D. K. Boylan, and the Central Methodist Church at Newark; that while many of the nephews and nieces of the testator, who were specifically remembered in some of the former wills, are not named in *this* document, yet that the whole residue is left to them, to the exclusion of Mrs. Meeker's blood, and that, judging from the bequests of this paper compared with former wills, the residue to be divided will be larger under this than it would have been under either of them. The Meeker Seminary, Jonathan M. Muir, and the relatives of Mrs. Meeker are the principal losers, and D. K. Boylan the only large gainer by this paper produced as a will. The bequests to particular friends in this paper is not a novelty. In the fragment of a will, made by the deceased in 1834, he gives to three sons of Mr. Whitehead and one son of Gov. Pennington $500 each.

9. Again, it is contended that the provisions of the controverted paper are *contrary to the expressed intentions, views, and feelings* of the deceased *before* the time it bears date and his *declarations subsequently made.*

Evidence was admitted in the court below, on both sides, covering this ground, and I think rightly. The great ques-

...se is—*is the will here produced genuine?* The ...stantially, of the caveators is—that it is not; ... surreptitious or procured by fraudulent means; ...ceased never executed *this paper* as his will. In ... of the case, I feel bound to look into the evidence ... phases in which it was presented below.

... In this paper produced for probate the *Meeker ... is abandoned.* It assigns a reason: "it has alway... ...y intention, and I have made several wills to that ... to establish in New Providence an institution of lear...n... to be called the Meeker Seminary; but on *consulting ...ood and judicious friends*, and on further reflection, I ... advised to divide the residue and remainder of my es... ..., which will amount to a large sum, equally among my ...phews and nieces." Now no person is produced with ...om deceased so consulted.

Again, the project of a seminary at New Providence had been in his mind for many years; he spoke of it to Mr. Low as early as 1836 or 8; in his wills of 1846, 1848, and 1851 it occupies a prominent place. The deceased, on the 5th of May, 1852, only seventeen days before his death, told Daniel Jaroleman that he had in his will left $10,000 for a seminary, to be built in New Providence; that he had left it in the hands of trustees, &c. On the 23d or 24th of January he told Mr. Low that he had left $10,000 for the seminary: got a map, and showed him where it was to be located; it was to be called the Meeker Seminary, and he had appointed trustees for it—told who they were, &c. In February, 1852, at Trenton, he told Mr. Corey he had very recently made a will, and in that will he had appropriated a certain piece of property for the purpose of locating a seminary, called the Meeker Institute or Seminary, saying he had made certain endowments to the amount of $10,000. He spoke of the same thing to Johnson in April, 1852, and to Noe about two months before his death. Now here are declarations of the deceased, made subsequent to the date of this paper, which,

had executed such a will, and had not destroyed it, can ewed in no other light than as deliberate falsehoods. ıere is some evidence, on the other side, that at times, e summer or fall of 1851, when speaking of the appro- ion by the city of his lands, he threw out intimations in consequence of that act, he intended to abandon, or abandoned the project of the Meeker Seminary; but ɜvidence is perfectly consistent with the supposition that d, in January, make a will omitting that bequest, and ɜquently changed his mind and destroyed it. But then, ı, there is very conclusive evidence of the deceased's re- ɜd *recognition of the September will, subsequent to* 12*th* ɜary, 1852, in other particulars. About the 23d or 24th ınuary, 1852, he told *Henry Low*, who was on a visit ɜ house, that he had made a will last fall, as he had told previously he was going to do; that he had left a house lot to Mrs. Hand in Fair street—also one to John ɛer, and entailed it; told him what he had left the ıary—said Jonathan M. Muir, Isaac Meeker, and Mrs. ɛer were his executors—thought Muir would make a executor. He told *Corey*, at Trenton, in February, , that he had recently made a will—spoke of what he left the seminary in it—spoke of the several distribu- of his property—said he had made several wills pre- ı to the last one, and in *this last will he had distributed roperty to his own satisfaction, and he doubted whether ould ever make another.* In a conversation with *Lewis k*, subsequent to January 12th, he said he had given)00 to build the Meeker Seminary—that he had not ı anything in his will to the Methodist Church at New idence; he said he would give something, and wished ess to come to his house and prepare *a codicil* for that ose. He said he had given Daniel Meeker $500; that ad given John Meeker a house and lot in Newark, and ɔrah Hand a house and lot—think he said he had en- d them. On *May* 3*d*, 1852, Mr. Clark went to the de-

ceased's house. After a good deal of conversation about other matters, he asked Mr. Clark if he would act as one of his executors, if he made him one; Clark asked who his executors were, and he said his wife was executrix, and James F. Meeker, Isaac Meeker, jun., and Jonathan M. Muir were executors—(these are the executors named in the September will). Mr. Clark declined. Deceased asked Mr. Clark then if *he would write an addition to his will*—the codicil before spoken of in favor of the Methodist Church at New Providence. He got paper, ink, and pen, *and the will*, or what he *said was the will*. Mr. Clark asked him if he kept a will in the house with him? He said he had kept a will written by him thirty years—had never been without a will in the house for thirty years, as witness understood him. Then he wished witness to draw on paper his codicil, to see if it met his views. Then a question arose about putting a bequest of $500 from his wife, in addition to one of $1000 from himself, in the codicil, and the matter was postponed. Now this is an extraordinary fact. The will the testator produced, and to which the codicil was to be appended, was clearly not the paper we have here; for this paper, at that time, on the 3d of May, 1852, was, according to the testimony of all the Hoyt family, lying sealed up in the envelope among Mr. Hoyt's papers at Hoyt's house. This paper appoints different persons from those named to Mr. Clark by the testator as his executors, and this paper contains a bequest of $1000 to the very church at New Providence which it was the object of the proposed codicil to make.

Again, on the 15th January, only three days after the date of this paper, the deceased told Mr. Brokaw that he had left Jonathan M. Muir the homestead farm, several acres of land on Stony-hill, and $2000. He told Valentine the last of February, 1852, that he had given Isaac Meeker, jun., the lots (mentioned in September will), and how he had provided for and endowed the Meeker Seminary (as in the will), and he repeated to him, in March, the gift to Isaac. Mr. Potter says he has heard testator mention the legacy

Seminary as late as within two months of his
told Linaberry, about the first of April, 1852,
willed a store and house to Caleb H. Muir. He
Wilcox, in April, 1852, that he intended the lot
Newark was taking to raise funds to build a
t New Providence, that he had intended, or had
is will, and that he had given his, witness' bro-
oys, a house in Newark, &c. He told Mr. Searles,
ary 12th, 1852, that he had given Jonathan M.
omestead, and told Mr. Noe, in March, 1852, that
a legacy to Isaac Meeker, jun. On the 18th of
1852, he wrote to Mr. J. T. Crane that he had set
petition to the Newark council, (dated in August,
he had ordered the property they were about to
sold, and the money appropriated to the erection
t of a school. On the 8th of March, 1852, he
same in substance to Mr. Clark. On the 15th
2, he writes to Mr. Crane, that if the law autho-
ity of Newark to take his land is not repealed, it
t his building a seminary. And on the 12th April,
vrites to Bishop Janes, then presiding over the
conference at Trenton, and asks the appointment
rele to the Methodist Church at New Providence,
Tully as presiding elder, promising, *if these ap-
are made*, to give $1500, &c., towards building a
h there, and giving the bishop an account of his
nd plans in reference to the seminary. All these
s and acts of the deceased, made and done subse-
ie 12th January, 1852, the date of the contested
show, if the deceased was sincere in what he said
hat he knew of no will but that of September.

vise to Boylan. The deceased had, in 1851, conveyed
wark to Boylan, under an agreement that Boylan
all his legal business—so that he was under no
to Boylan. *Mr. Runyon* says that, on the second
, 1852, deceased came to him to get a brief prepared,

to be used before the common council in opposing the project of taking his land for a park; that he, Runyon, suggested to him to get Boylan to prepare it, and his reply was, "I won't; *Boylan is a d—d rascal;* I have no confidence in him; I believe nothing would suit him better than for the city to take the property, so that he could get the money for the lot I have given him, and put it in his pocket." Subsequently he used, on another occasion, similar language in regard to Mr. Boylan. The first conversation, it will be seen, is only ten days prior to the date of the January will, and the second, Runyon thinks was about two weeks after, which would be very near the 12th January. He told *Col. Plume*, about the middle of January, 1852, he thinks, that he had lost all confidence in Boylan, and that he believed he would cheat him out of all his property if he could; that he was a great rascal—linked in with the city. [It may be stated in this connection, as a singular contradiction in the evidence, which can only be reconciled on the theory that some such will had been made and destroyed, that about the 13th, probably the very day after the Hoyt will is dated, when the deceased was undoubtedly in Newark, Mary J. Trimble says the deceased told her, at Boylan's office, that "he had left Boylan the property the city wanted to rob him of, and that was not all he had left him; that he wished Boylan to know all about his business, for he would have to settle it up after his death."]

Mr. Keys says that deceased told him, in February, 1852, that a lawyer, he thinks he called him *Bowling* or *Bolling*, and the corporation (of Newark) were concocting to swindle him out of the property. He told *Joseph C. Noe*, about the middle of February, 1852, that the city of Newark was trying to take a piece of land from him for a public park, and he had got Mr. Boylan to intercede for him; but instead of doing that he was working against him, and he believed him to be a damned rascal, or scoundrel, and he would not trust him with a dog's dinner. In the latter part of April, or the first of May, he spoke very much in the same

way of Mr. Boylan to *Henry Low*. He told *Mr. Corey*, at Trenton, in February, 1852, that he had no confidence in Boylan—told about his giving him a lot, and that his design in doing so was that Boylan should assist in fighting the common council, but he had become satisfied that Boylan was operating against him secretly in favor of the city; said he did not care about offending Boylan until he had got his business settled up with him, which he intended as soon as possible; and he intended to take his business out of his hands; and he expressed his distrust of Mr. Boylan to *Mr. Hull* in the winter of 1851–2.

There is a good deal of evidence, however, that his opinion of Mr. Boylan underwent frequent changes, and that the idea of leaving the park property to him to fight the city with had been in his mind. I do not attach any importance to the fact, that he continued up to his death to employ Boylan professionally, for he had already paid him for these services by conveying some property to him, and it was quite natural that he should go to him, even though he doubted or disliked him. But *Mr. Harriot* speaks of a conversation, in November or December, 1851, in which deceased said he was going to leave Boylan part of his property to carry on the suit with the city. Several other witnesses are produced who heard the deceased, in the winter of 1851–2, or spring of 1852, speak favorably of Mr. Boylan as his friend, as having done his business satisfactorily—and mention Boylan's family in terms which indicated that he was pleased with them. This evidence, in connection with Mrs. Trimble's, goes in corroboration of the testimony as to the actual execution of a will at Hoyt's in which Boylan had an interest, but it also indicates that the devise to him had a specific purpose, to wit, the resistance of the attempt of the city of Newark to take his property for a park. But there is not in it *that* which, in the face of the conflicting testimony, satisfies my mind that the deceased, on the 12th January, made, in substance, an unconditional and absolute devise of so large

to be used before the common council in opp
of taking his land for a park; that he,
to him to get Boylan to prepare it, a
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an amount to Mr. Boylan, and adhered to it up to the day of his death.

Nor, upon the most careful examination of the evidence, am I able to see that the attempt to prove a clear recognition by him of the will of January 12th as an existing will has been successful. It is said this may be accounted for upon the testimony of the Hoyts that the deceased desired the will to be a *secret.* But the will, according to the witnesses at Hoyt's, was not intended to be so very secret. It was executed, they say, in the presence of five persons, two only being necessary; the will was read over to them all, which was quite unnecessary, and the deceased *took it away to show to friends.* True, *Mr. Nichols* testifies that deceased told him, in February, 1852, that there was no need of his setting apart funds to defeat the law authorizing his lands to be taken; that he had made provision in his will to have it carried up to the highest court of appeal or the highest court in the United States. But then there is *no such provision in the paper here produced as a will*—all we find there is the simple expression of a *wish,* a *desire,* that Boylan should contest the matter in the courts of New Jersey, and he is left to do it at his own expense, if he thinks fit—that is the amount of it. Mr. Heaton speaks of conversations with the deceased about the Methodist Church in Newark (to which $500 is given in this paper, and nothing in the will of September, 1851,)—and says, on one occasion deceased said "that I (witness) would find he had not forgotten it; that he *should do* something pretty nice for us." He *thinks* that conversation was in the winter of 1851–2; but this language has no manifest reference to a *bequest* he had made, or intended to make—it more naturally signifies that he intended, and would make them a *donation;* this was what the witness was pressing him for. The Rev. Mr. Fort's testimony is somewhat relied on to prove a recognition by the testator of the will of January, 1852. It will be remembered that, by the will of 1848, $1000 was bequeathed to the Methodist Church at New Providence. That legacy was omitted in the will of September,

1851, and is found inserted in this paper offered for probate. Mr. Fort says, that in a conversation he had with the deceased in *May*, 1852, a little before his decease, he told him "it was his *intention* to leave us $1000 towards the erection of a new church, provided we expended $4000;" [the bequest in the contested will is "$1000 when they build a new church which shall cost $3000, provided it is built in three years after my decease."] "I wished to know," says the witness, "whether the legacy would be available upon his death"—"whether it was in lands or money." He stated it was a specific legacy from residuary property; that if his executors were careful in settling up his estate there would be no difficulty about our bequest. I thanked him for the offer, and told him pleasantly that we would erect a *monument* to his memory. He stated that he had made arrangement for a monument. But much of the force of this testimony, as well as that of Mr. William G. Lord, to the effect that, in April, 1852, the deceased told him that he had been making a will recently, and had left $1000 to this church, is neutralized by that of Mr. Levi Clark; for it will be remembered that, as late as May, 1852, deceased was arranging with Mr. Clark to have a codicil prepared bequeathing this very amount to that church project; and it is not improbable that, speaking with Mr. Fort and Mr. Lord, he may have referred to a thing *as done* which he was *about to do*. As to the *monument*, making "arrangement for a monument," by no means necessarily implies a direction to that effect by will. Again, Mr. Fort says he told Mr. Meeker that he understood he intended to leave the farm, the homestead, and some $30,000 besides, to Mr. Muir; that deceased said, "it is not so; I shall only leave him a few thousand dollars, and that is all"—all what?—"*all besides the farm*," is quite as natural an interpretation as, "all I shall leave him is a few thousand dollars," which is the interpretation the counsel for the will put upon it; and the September will leaves Muir the farm, &c., and $2000, while the *contested will* gives him *a house and* $1000, a provision *totally at variance with*

what deceased told Mr. Fort he had made for him. There is another part of Mr. Fort's testimony which is relied on to make out a recognition by the deceased of the January will as in existence. It is the conversation the witness had with him in his last sickness, a few days before his death. Mr. Fort, on that occasion, pressed upon him, as he says, "the importance of giving the money (the $1000 to the church) in his lifetime, that he might see the good of it, and be his own executor," and wanted to get his name to a note or a subscription paper for the amount; but he says the deceased refused—said his matters were all ar-arranged—he did not like to disarrange them—that "he *had designed* to leave us the $1000; that his temporal matters were all arranged, and he did not wish to disarrange them." Taking the whole of this conversation, it makes against the contested will, and not for it. The deceased did not say, according to the evidence, in this last conversation, that he *had* bequeathed a legacy to the church, but that *he had designed to do it*—which Mr. Clark's testimony shows to have been the fact. Mr. Fort's impression, derived from his various conversations with the deceased, doubtless was that $1000 was left to the Methodist Church at New Providence by the will; but it seems equally clear that he also got the impression that a like sum was left in the will to the Presbyterian Church in the same place, which is not found in either the September will or in this paper.

I have already alluded to the extraordinary fact in this cause, that *it has never been discovered who drew this paper.* And I cannot but think it somewhat extraordinary that the fact of Mr. Meeker's bringing back and depositing with Mr. Hoyt the paper executed by him on the 12th January is left to rest *upon the testimony of Hoyt alone.* His credit was attacked, and no counter testimony taken to rebut that attack. The account he gives of it is, that from one to three weeks after Meeker left his house on the 13th, the day after the execution, taking the paper with him, he came to his (Hoyt's) house, about ten o'clock in the morning, and said

(I give his words) "he wished me to take the will again that was executed at my house. I took it, and then said I would keep it for him, as I found it was the cheapest way to satisfy him. He then asked me to put a new envelope on it, as the old one had got quite dirty and some torn. I did so. He then asked me to put on a seal—to seal it up. I *sent for a candle and sealing-wax*, and did so. He then asked me, or told me, to write 'Jonathan M. Meeker's will, of New Providence, Essex county, New Jersey.' He wrote it, in the first place, with a pencil, and I then wrote on the envelope—'Not to be opened until ten days after my decease.' He then asked me to put *my* signature under it; I told him I would not do it—there was no necessity for it. He then went on trying to show me the inconsistency of what I had said, and in order to get rid of him, I thought it would be the shortest way to write my name, and I did so. I then carried the will up stairs, and put it with my valuable papers; came down, and told him that I must go away, as I was obliged to take the Philadelphia train at one o'clock for New York at Elizabethtown. We both left the house at the same time." Now, in the first place, I cannot understand why Mr. Meeker should have taken so much pains to keep his own handwriting from appearing on this envelope—why he should write on paper with a pencil the words Mr. Hoyt should put on the envelope, instead of endorsing it himself—why not sign with his own hand, at least, the direction about the envelope not being opened. As the endorsement stands, signed by Hoyt, it is an absurdity—signed by Meeker it would have been proper and intelligible. Meeker was in the habit of writing, and wrote a good hand for an old man. In the second place, this transaction does not appear to have been a secret one—why is there no evidence corroborating Mr. Hoyt's account of this visit? Where and who is the person that was *sent for the candle and sealing-wax?* Did nobody see Mr. Meeker on that occasion, or know of the purpose of his visit but Mr. Hoyt? Mr. Hoyt's testimony goes to intimate that he was reluctant all along to have anything to do

with this will—that especially he desired not to be the depositary of it—and yet he produces this paper without a particle of testimony, except his own, that it was ever deposited with him by Meeker, and without a single stroke of Meeker's hand on the will or the envelope, except the signatures to the will, which were absolutely indispensable. If Mr. Hoyt had exhausted all his ingenuity in throwing doubts over this whole transaction it could hardly have been done more successfully.

Now, I take it, the facts stand thus upon the evidence.

1. It is proved that the deceased executed a will at Mr. Hoyt's house on the 12th January, 1852, and *took it away with him.*

2. The deceased was, at the time, of memory and understanding sufficient to make a valid will.

Then here is a paper propounded for probate, alleged to be the paper executed on the 12th January as his will, and it is met—

1. By a variety of suspicious circumstances—as to its place of deposit—its dissimilarity to all former wills of the deceased in point of form and detail—in an unknown handwriting—the genuineness of the signatures of the deceased questioned—the conduct of Mr. Hoyt, who produces it, and of Mr. Boylan, a very large beneficiary in it, open to criticism—a previous will carefully drawn by the testator found in his house among his papers uncancelled, and bearing date only three months and seventeen days before—and a large mass of evidence showing conclusively that, with very few exceptions, in all the conduct and conversations of the testator, from September, 1851, to the time of his last sickness, he acted on and distinctly recognized the provisions found in the will of September as the provisions of his last will and testament—never directly spoke of the January will, and in but few instances gave any intimation of such a disposition of his property as is found in this paper; and even when he does refer to some such provisions, they are not entirely in accordance with those we here find, or are entirely recon-

cilable with the belief that he had made a will somewhat different from that of September, and had destroyed it—and the question left for consideration is, whether the evidence of identity—the proof that this is the paper executed at Hoyt's —is sufficiently clear and conclusive to stand against the mass of evidence that conflicts with it.

Four witnesses—Mrs. Hoyt and her three daughters—are the only *reliable* witnesses upon this question. They saw a will executed—they saw the paper, as the testator held it in his hands and as he read it, or read some part of it. They saw it lying on the table in the process of execution. No one of them had it in her hands or examined it. It was by candlelight, between seven and ten at night. One of the four, Anna, signed it—they all saw the testator sign it. He talked about the different provisions, and generally about his property, relatives, and affairs during the time he had the paper there—talked for an hour and a half. The paper was *then put in his pocket or pocket-book by the testator*, and these witnesses saw no more of that paper then.

Some time after—two or three weeks they think—one of them, and another, and another, saw an envelope, endorsed as and undoubtedly the one produced, among Mr. Hoyt's papers. How it came there they have no personal knowledge. This envelope remains in Mr. Hoyt's possession until about the second of June, when he formally *breaks the seal in their presence, produces from it the paper now offered for probate, and reads it to them.* He says it is the will executed on the night of the 12th—he so informed them—and *Anna Hoyt* says she recognized it as the same paper when the envelope was removed. *Elizabeth* says it is the same will she saw executed. *Mrs. Maria L. Hoyt* says she identifies it as the same, and upon reading it now has no doubt it is the same read at her house, and she gives the reason why she recollects several of the bequests. And *Mary L.* says she should think, from the appearance, this is the same paper—the same handwriting in the body of it. They all speak with confi-

dence, too, as to the genuineness of the signatures, and I do not doubt that they speak what they believe to be the truth.

This, under any ordinary circumstances, would doubtless be conclusive. But when it is weighed against the testimony on the other side, is it sufficient to produce conviction? Are not these witnesses deceived? It was nearly five months since they had seen the will executed that this paper was produced. It was then produced under circumstances which awakened no suspicion in their minds—they had understood all along that *the will* was in that envelope—when opened, Mr. Hoyt produced it *as the will*. *Anna* testifies some three weeks after this—*Elizabeth* nearly seven months after—*Maria L.* eight months after, and *Mary E.* nearly eleven months after. How easily after this lapse of time the witnesses, especially the last three, might confound the impression made upon their minds by this paper, shown and read to them *in June*, with their recollections of that they saw by candlelight on the 12th of *January*.

The grounds upon which these witnesses rest their belief that this is the same paper are—1. The *general appearance* of the handwriting in the body of it. Now, if this is a surreptitious paper, it is not impossible or improbable that it was drawn by the same person who actually drew the paper executed in January. But independent of this, I think, as a general truth, a strange handwriting, seen casually by candlelight, is seldom very accurately remembered after so long a time, unless when first seen the attention of the witness is very specially called to some peculiarity in it or about it. Then—2. The witnesses recognize the *signatures*. Anna Hoyt believes she recognizes her own signature there. Now, as to this, experience teaches us that it is no very difficult thing to make the *fac simile* of a signature a thing so perfect that the keenest expert may be deceived, when the party making it has possession of the genuine signatures to be imitated. Then the last ground of recognition is the *contents* of the paper. But the will actually executed in January had, it is to be presumed, devises or bequests of some kind

in it to every party named in this paper, and its general contents were no doubt, in all these particulars, very much as the witnesses testify. Yet how easily, if that paper was destroyed, might a substitute for it be prepared making changes in the dispositions, as to some of the parties, of the most vital character, which would not be observed by these witnesses after hearing Mr. Meeker read and talk about a will, his property, his relations, and affairs for an hour and a half. No doubt the attention and curiosity of these witnesses were awakened by the singular circumstances of Mr. Meeker coming there to execute a will; but they cannot tell how many leaves it was written on, though this paper has but *three*, nor how many times the deceased wrote his name on the margins, though written here but *three* times.

The deceased was very much in the habit of making wills. Several of his old wills and fragments of old wills are produced. Hoyt had once drawn a will for him, of which nothing has been heard. One of his last acts was to try and get Mr. Clark to prepare a codicil. He made wills, and had them made for him; soon changed his mind, and cancelled or destroyed them. It seems to have been an inveterate habit with him, too, to talk about his wills and the bequests he had made. So that there is nothing incredible in the supposition that such a will as is found was made by him in January, and afterwards destroyed by him. It would be in vain, and worse than in vain, to speculate as to how this strange state of things has been brought about, or who are implicated in it. It cannot be denied that clouds and shadows hang about the case—that it is full of difficulties,—but we must tread our way by the best lights we have. That which convinces the judgment must be taken as the truth of the case. I cannot say that Mrs. Hoyt and her daughters are perjured—it would be as unjust as cruel to say it—the evidence does not warrant me in saying it. Then a will *was executed* in January. The deceased was then of sound and disposing mind and memory. Upon the testimony in this cause I should violate every settled rule of decision upon

such questions to deny it. Yet the testimony is to my mind *conclusive* that the deceased never, in the last months of his life, dreamed even that the will of September was not his last will; to question that would be, it seems to me, to give the lie direct to all he did and said in the latter part of his life. I find it impossible to bring my mind to the belief that this paper is his will. The Orphans Court, from which this appeal comes up, after the long and laborious investigation they gave this question, decided unanimously on all the facts that it was not his will, and I cannot on my conscience say they were wrong. I am therefore bound to advise his Honor the Ordinary that the decision of the court below be affirmed, *so far* as it *denies probate of this will.* As to that part of the decree which denies *costs and expenses* to the party propounding this paper for probate out of the estate, after much hesitation, I have come to the conclusion that there should be a *reversal,* on the ground that the caveators have not made out by direct proof any fraud as against Boylan, or any direct knowledge on his part that this paper was surreptitious at the time he offered it for probate. It did not come from his custody. He was named in it as executor. It may be he honestly believed it to be the paper it purported to be. His connection with it is unfortunate; but he ought not to be condemned, upon suspicion merely, to the heavy costs and expenses of conducting these proceedings; I am therefore disposed to advise his Honor the Ordinary that the costs and reasonable counsel fees of the party propounding this paper for probate should be paid out of the estate. This seems to me the more reasonable, from the fact that the competency of the deceased to make a will was put in issue by the caveators, and has been sustained.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE STATE OF NEW JERSEY,

MAY TERM, 1862.

HENRY W. GREEN, ESQ., ORDINARY.

SARAH B. SMITH, appellant, *and* JONATHAN E. MCCHESNEY and others, respondents.

A testator made a will in 1850, a codicil thereto in 1854, and a subsequent will in 1858, by which he bequeathed and disposed of all his real and personal estate without exception, and which contained a clause, "hereby revoking all former wills, and declaring this to be my last will and testament." After the last will had been admitted to probate, on an application to admit to probate the codicil of 1854, it was *held* that the last will contains both an implied and express revocation of the codicil. The revocation extends to all prior testamentary dispositions of testator's estate, real and personal.

It is a principle, as ancient as it is familiar, that no man can have two wills. The last will is of necessity a revocation of all former wills, so far as it is inconsistent with them. So if one having made his will, afterwards make another will inconsistent therewith, but not expressly revoking it, this will nevertheless be a revocation.

This implied revocation is effected only when the last will is inconsistent with the former; for it may be a will of different goods, or different pieces of land, so that the two may be taken conjointly as the will of the testator.

If the latter will contain an express revocation of the former, it is imma-

terial whether the latter be or be not inconsistent with the former, or whether it operates as a will at all or not.

It is undoubtedly true that the revocatory clause is not always inoperative, and that its effect depends upon the intention of the testator, but that intention must in every case be gathered from the contents of the instruments themselves. Parol testimony is inadmissible for this purpose. It is never admissible to contradict by parol the terms of a will, or to overturn its plain provisions.

On appeal from the Orphans Court of the county of Mercer.

M. Beasley, for appellant.

This codicil may be admitted to probate notwithstanding the last will, if the court is satisfied that it was not the intention of the testator to revoke the codicil. 1 *Williams on Executors*, 133; 2 *Greenleaf's Evidence*, § 682.

The clause in the will of 1858, by which testator declares that he "revokes all former *wills*," has no other effect than to destroy the will of 1850. It does not revoke the codicil. *Van Wert* v. *Benedict*, 1 *Bradf.* 114, 121; *Denny* v. *Barton*, 2 *Phill.* 575.

The intention of the testator is clear from the testimony, and parol evidence is admissible to show his intention. 1 *Williams on Executors* 312; *Sandford* v. *Vaughn*, 1 *Phill.* 128.

Richey, for respondents.

The will of 1858 contains a total disposition of all testator's property.

This is an implied revocation of all former wills and codicils. It is inconsistent with the existence of any prior testamentary disposition of the property. 1 *Williams on Executors* 130; *Snowhill* v. *Snowhill*, 3 *Zab.* 447; 1 *Powell on Devises* 517; 2 *Greenleaf's Ev.*, § 681; 1 *Jarman on Wills* 156; *Cutty* v. *Gilbert*, 29 *Eng. Law and Eq.* 64, 69; *Moore* v. *Moore*, 1 *Phill.* 375.

Parol evidence is inadmissible, and if admissible is of little value against testator's acts; —— v. *Henning*, 1 *Phill.* 439.

Here is a clear and express revocation of all former wills. 1 *Jarman on Wills* 56; 2 *Greenleaf's Ev.*, § 681; *Boudinot's Ex'r* v. *Bradford*, 2 *Dall.* 267.

The execution of the second will is a destruction, and not a suspension of the former will. A subsequent destruction of the second will does not revive the first. *James* v. *Marvin*, 3 *Conn.* 576.

THE ORDINARY. Charles G. McChesney, of the city of Trenton, made and published his last will and testament, bearing date on the twentieth of October, 1858. The will contains a clause revoking all former wills. The testator died on the seventh March, 1861. This will, having been duly proved by the subscribing witnesses, was admitted to probate by the Orphans Court of the county of Mercer on the twenty-second of April, 1861. The testator had in his lifetime executed a previous will, bearing date on the twenty-eighth of January, 1850, and also a codicil to said will, bearing date on the twenty-seventh of April, 1854. This codicil was also offered to the Orphans Court for probate by Sarah B. Smith, the principal legatee therein named, but the court, by their decree, dated on the second of May, 1854, declared the said paper writing, purporting to be a codicil to the will of the said Charles G. McChesney, deceased, to be null and void, and denied probate thereof. From that decree the proponent appealed.

The only question involved in the controversy is, whether the will of 1858 operated as a revocation of the *codicil* to the will of 1850.

It is a principle, as ancient as it is familiar, that no man can have two wills. "A man," saith Swinburne, "may, as oft as he will, make a new testament, even until his last breath, neither is there any cautel under the sun to prevent this liberty. But no man can die with two testaments, and therefore the last and newest is of force. So that if there were a thousand testaments, the last of all is the best of all,

and maketh void the former." *Swinb. on Wills, part* 7, § 14.

As a necessary consequence of this doctrine, the last will is of necessity a revocation of all former wills, so far as it is *inconsistent* with them. So if one, having made his will, afterwards make another will inconsistent therewith, but not expressly revoking it, this will nevertheless be a revocation. 1 *Pow. on Dev.* 517.

This implied revocation is effected only when the last will is inconsistent with the former. For it may be a will of different goods, or different pieces of land, so that the two may be taken conjointly as the will of the testator. 1 *Powell* 518; 1 *Williams on Ex'rs* 135.

But if the latter will contain an express revocation of the former, it is immaterial whether the latter be or be not inconsistent with the former, or whether it operate as a will at all or not. *Powell* 116.

It is difficult to see how, under the operation of these familiar principles, the codicil offered for probate can be sustained as a subsisting testamentary instrument. By the codicil, dated in 1854, the testator gave to Sarah B. Smith, the appellant, five thousand dollars, and all the furniture and silver that belonged to his wife. He also gave the sum of twelve hundred dollars to his executor, in trust for certain purposes therein specified. By the will of 1858, which has been admitted to probate, he gives all his estate, real and personal without exception, to his wife for life, with power to dispose of one half by will to such persons as she may designate, the other half to go to the testator's heirs, under the direction of his wife. Here is an absolute disposition of all the testator's estate, real and personal, totally inconsistent with the disposition made by the codicil. The two cannot stand together. The will *ex necessitate* revokes the codicil, as well as the original will of 1850. The death of the wife before the testator cannot affect the question of revocation.

In *Henfrey* v. *Henfrey*, 2 *Curteis* 468, the testator left two wills of different dates, the latter disposing of the whole of

his property to his wife, but containing no appointment of executors and no revocation of the former will, nor of the appointment of executors therein. The latter was held to have revoked the former, and to be alone the will of the testator. Sir Herbert Jenner said, "the latter paper, in my view of it, was executed as a will, and not as a codicil, and being so executed, and a perfect instrument disposing of all the property, although there is no express revocation of the former will or of the appointment of executors, it is *ex necessitate* a revocation of the former will."

But the case of the respondent does not rest upon an *implied* revocation only. The will of 1858, which has been admitted to probate, contains this clause: "Lastly, I hereby constitute and appoint my dear wife executrix of this my last will and testament, hereby revoking all former wills, and declaring this to be my last will and testament."

Here is an express revocation of all former wills. The revocation extends to all prior testamentary dispositions of the testator's estate, real or personal. It is difficult to conceive of a clearer case of revocation, both implied and express, than is found upon the face of the testator's last will.

I do not understand it to be seriously contended, by the counsel of the appellant, that the clause of revocation does not extend to all former codicils, as well as to all former wills, or that a codicil is not a will within the common understanding of the term.

But it is urged that the revocatory clause is not always imperative, and that its effect depends upon the intention of the testator. That is undoubtedly true. The effect of every testamentary disposition depends upon the intention of the testator. But that intention must, in this as in every other case, be gathered from the contents of the instruments themselves. The authorities cited clearly establish this doctrine. *Denny* v. *Barton*, 2 *Phill.* 575; *Van Wert* v. *Benedict*, 1 *Bradf.* 121.

Parol testimony is inadmissible for this purpose. It is

never admissible to contradict by parol the terms of a will, or to overturn its plain provisions.

It is further urged, that the contents of the wills and the codicil, in connection with the circumstances of the testator's family, do in themselves furnish satisfactory evidence that the testator did not intend to revoke the codicil.

The testator had no children. The proponent was a niece of his wife, and an adopted daughter, who had resided for several years in his family, and to whom the evidence shows that he was sincerely attached. A portion of the testator's estate was derived from his wife. The primary design of the testator, both in the will of 1850 and in the will of 1858, was to secure his entire estate to his wife for her life, and on her death to place the one half of it under her control, thereby enabling her, at her pleasure, to make provision for the appellant. The other half of the estate is given to his own relations. In these respects the wills of 1850 and 1858 are nearly identical.

It appears, from the evidence, that the codicil of 1854 was prepared and executed by the testator on the eve of his embarking with his wife for Europe. The codicil (as are both the wills) is in the handwriting of the testator, and is written upon the same sheet with the will of 1850. It commences with the following recital: "Codicil to the foregoing will, which is to be considered and taken as part thereof.—Whereas my wife and self are about to visit Europe, and may not be spared to return, considering the uncertainty of life, I therefore give and bequeath to my adopted daughter, Sarah B. Smith, the sum of five thousand dollars, to be paid," &c. The writing concludes thus: "Lastly, I appoint Thomas J. Stryker my executor, to take upon himself the foregoing bequests. This codicil to be null and void should my dear wife return in case of my death only."

The main design of the codicil was to secure a provision for the adopted daughter in case of the death of her aunt. It doubtless occurred to him, that if his wife died abroad intestate her estate would go to her relatives generally. No

provision whatever was made for the appellant, and her share of the estate would go equally to her next of kin. If the testator died, and the wife returned, the codicil was to be void. But still another contingency presented itself Both the testator and his wife might die before their return, and in that event, although the wife survived her husband, no provision would have been made for the adopted daughter. To meet this contingency, on the twenty-sixth day of April, 1854, the testator and his wife executed a deed to the appellant, in consideration of natural love and affection, for valuable real estate in Hightstown. This lot, it appears, originally belonged to Mrs. McChesney, but it was built upon, and its value materially increased by the testator, and seems to have been considered as Mrs. McChesney's property. The evidence renders it probable, and I shall assume it as satisfactorily established, that this deed, with the will and other papers enclosed in a sealed envelope, were delivered by the testator before sailing for Europe to Mr. Stryker, the executor named in the codicil, with instructions endorsed upon the package, that if neither he nor his wife should return from Europe it should be delivered to Miss Smith. The package was returned to the testator on his return home. The execution of the codicil and the deed seem to have been designed solely to secure, in any contingency, a provision for the appellant in the event of the death of the testator's wife. If the wife died, being unable, as a *feme covert*, to dispose of her property, the will secured a provision out of the estate. If the wife returned, having survived the husband, she would be able to make provision out of her share of the testator's estate, and in that event the codicil was void. If neither returned, the deed would secure the provision out of the land which had belonged to the wife. I see no indication in the arrangement that it was the intention of the testator that the appellant should have both the legacy of five thousand dollars and the real estate conveyed by the deed. The plain and unmistakable design of the whole transaction was, that the appellant should be provided for, either by the

legacy or by the gift of the land. It was not intended that she should take both.

The will of 1858 was executed as the testator was again about departing for Europe, and it is urged that, as the same circumstances continued, the same motives must have operated to continue the codicil in force then as at the time it was executed, and that the testator could not therefore have contemplated its revocation. The decisive answer to this argument is, that he did in fact revoke the codicil and all other wills in terms the most apt, clear, and unequivocal. Subsequently to his last return from Europe, on the fifteenth day of February, 1860, the testator and his wife executed to the appellant another deed for a lot of six acres near Hightstown. At the same time the grantee executed to the testator a lease for his life of all the lands conveyed to her by the testator and his wife. Both deeds appear to have been delivered to the appellant at the same time. They were recorded together soon after the death of Mrs. McChesney. The purpose of the codicil was thereby fully accomplished. Provision for the appellant was secured, in the mode originally contemplated by the testator, out of that portion of the property, the title to which was in his wife. And as the deeds were both executed in the lifetime of Mrs. McChesney, and recorded immediately after her death, the fair presumption is that they constituted the provision which the testator and his wife designed to make for their adopted daughter. However this may be, and whatever doubts might be suggested by the casual conversations of the testator, the legal rights of the parties are too clear to be mistaken.

The decree of the Orphans Court must be affirmed with costs.

EXECUTORS OF ELIZA MOORE, appellants, *and* ELIZA BLAUVELT, respondent.

What constitutes undue influence can never be precisely defined. It must necessarily depend in each case upon the means of coercion or influence possessed by one party over the other. Whatever destroys the *free agency* of the testator constitutes undue influence. It is immaterial whether that object be effected by physical force or mental coercion, by threats which occasion fear, or by importunity which the testator is too weak to resist, or which extorts compliance in the hope of peace.

Threats of personal estrangement and non-intercourse, addressed by a child to a dependent parent, or threats of litigation between the children to influence a testamentary disposition of property by the parent, constitute undue influence.

The fact that a testator has been induced to make a new will by false representations as to the contents of an existing will, is a proper element in the consideration of the question of undue influence, although the new will may not materially vary from the former one in respect to the subject matter of the false representations.

Testimony on a question of undue influence, which is but matter of opinion, is entitled to consideration only so far as it is sustained by facts.

Bradley, for appellant.

I. As to wills executed by blind persons, cited *Weir* v. *Fitzgerald*, 2 *Bradf.* 68—71; *Blake* v. *Knight*, 3 *Curteis* 547; 1 *Jarman on Wills* 47–8 (*old edition*); *Fincham* v. *Edwards*, 3 *Curteis* 63; *Modern Prob. of Wills* 201—12; *Longchamp* v. *Fisk*, 5 *Bos. & P.* 415.

II. As to testamentary capacity.

Boylan ads. *Meeker*, 4 *Dutcher* 277, (recognizing 4 *Wash. C. C. R.* 267–8–9); *Den* v. *Vancleve*, 2 *South.* 670; *Harrison* v. *Rowan*, 3 *Wash.* 585—7; *Sloan* v. *Maxwell*, 2 *Green's Ch.* 571, 581; *Whitenack* v. *Stryker*, 1 *Green's Ch.* 11, 12, 26–7; *Lowe* v. *Williamson*, *Ib.* 85–6; *Den* v. *Gibbons*, 2 *Zab.* 132, 155–6; 26 *Wendell* 265; *Modern Probate of Wills* 96, 112.

III. As to what constitutes undue influence.

1 *Jarman on Wills* 36–7; *Tunison* v. *Tunison*, 4 *Bradf.* 138; *Chandler* v. *Ferris*, 1 *Harring.* 454; *Lide* v. *Lide*, 2

Brevard 403; *Small* v. *Small*, 4 *Greenl.* 220; *Ise* v. *Bennett*, 1 *Coxe;* 4 *Wash.* 268–9; *Whitenack* v. *Stryker*, 1 *Green's Ch.* 267; *Lowe* v. *Williamson*, *Ib.* 86.

As to the opinions of witnesses.

De Witt v. *Barby*, 13 *Barb.* 550; *Culow* v. *Haslam*, 7 *Ib.* 314.

Zabriskie, for respondent.

As to what constitutes undue influence.

1 *Jarman* 37, 41; 1 *Williams on Ex'rs* 41—5.

THE ORDINARY. This case comes before the court upon an appeal from a decree of the Orphans Court of the county of Bergen, refusing to admit a paper writing to probate as the will of Eliza Moore.

The *factum* of the will is fully established. The instrument was executed and attested with all the formalities prescribed by the statute.

Nor is there any sufficient ground to question the testamentary capacity of the testatrix. There are, indeed, one or two witnesses, on the part of the caveator, who entertain a contrary opinion, and state circumstances tending strongly to corroborate that opinion. But the weight of evidence is very decidedly in favor of testamentary capacity. The evidence of the family physician of the testatrix, and of the pastor of the church of which she was a member, is clear and decisive. Upon this point I entertain no doubt.

The ground relied upon by the caveator is, that the will was procured by undue influence.

What constitutes undue influence can never be precisely defined. It must necessarily depend, in each case, upon the means of coercion or influence possessed by one party over the other; upon the power, authority, or control of the one, the age, the sex, the temper, the mental and physical condition, and the dependence of the other. Whatever destroys the *free agency* of the testator constitutes undue influence. Whether that object be effected by physical force or men-

tal coercion, by threats which occasion fear, or by importunity, which the testator is too weak to resist, or which extorts compliance in the hope of peace, is immaterial. 1 *Jarman on Wills* 36–9–40; 1 *Williams on Ex'rs* 40, 45; *Kindeside* v. *Harrison*, 2 *Phill.* 449; (1 *Eng. Eccl. Rep.* 336); *Mynn* v. *Robinson*, 2 *Hag.* 169; *Small* v. *Small*, 4 *Greenl.* 223; *Davis* v. *Calvert*, 5 *Gill & Johns.* 302; *Martin* v. *Teague*, 2 *Spear's R.* 268.

In considering the question of undue influence, therefore, it becomes essential to ascertain, as far as practicable, the power of coercion upon the one hand, and the liability to its influence upon the other.

The testatrix, Eliza Moore, at the date of the will, had been nearly seventeen years a widow, her husband, Lewis Moore, having died in June, 1843. She had been the mother of thirteen children, of whom nine survived, and one of those deceased had left sons who were the objects of her bounty. Her children had all attained mature age. Three of them, a son and two daughters who remained unmarried, resided with her in the homestead at Hackensack. Her precise age does not appear by the evidence. None of her children speak of it. Her pastor, the Rev. Mr. Warner, thinks she was about seventy-five or seventy-six when she died. In this he was doubtless in error. Her son states that she was married in 1798, when she could have been, according to this estimate, but thirteen or fourteen years of age. It is safe to assume that at the date of the will she was about eighty years of age. She had been in the vigor of her days, as all the evidence shows, a woman of remarkable energy and decision of character. One of the witnesses describes her as a woman of strong, earnest, and decided will; another, who knew her well, says she was a woman of great energy, strong purpose, and clear foresight. She was very deliberate, a woman of good judgment, and when her judgment was once formed nothing could shake it. She was perfectly self-reliant, and not subject to be influenced by others. Another witness considered her a woman of firm mind, unusual deter-

mination of will, and not easily swerved from her own opinions. One of her children says of her—she was always firm and decided, and never gave way to either of her children before she lost her strength of mind.

At the date of the will her physical and mental powers had become impaired by age, disease, and care. She was totally blind. She required constant attendance and nursing. She was helpless, and confined almost entirely to her bed. She suffered from extreme nervous irritability, and was often in a state of high nervous excitement, resulting from family troubles. Within a year preceding the date of the will, she had been greatly shocked by the death of a daughter. Her physician testifies that "there were times when she would not have been capable of directing her attention to the matter of making a will. The whole powers of her mind would be overwhelmed, apparently, by the intensity of her suffering. The symptoms of her nervous morbid irritability exhibited themselves in a very remarkable degree. I gave her nervines and tonics, and for the rest depended upon kind nursing and freedom from excitement as much as practicable. Powerful and frequent anodynes were used, and she was kept to some extent under their influence. The highly morbid irritable state of the nerves under which she labored is very frequently the precursor of insanity, and it was to enable the brain to recuperate its energies and powers that I employed these remedies to prevent that unfortunate result. In the nervous condition in which the testatrix was, anything that excites the mind greatly makes it temporarily in a condition approaching insanity, and may very easily produce insanity. The morbidly sensitive nervous state in which the testatrix was about the time of making the will would materially diminish her powers of resisting urgent and continual importunities of those about her to change her will. To the question, whether the testatrix would certainly have yielded to any continued urgency by the united importunity of the children that were about her, he says, I cannot answer differently from what I did to the

last question. Her situation was peculiarly dependent, being blind and dependent upon her children around her. Whether she would positively resist, I cannot answer.

I deem this testimony of her physician especially worthy of notice, not only from the fact, that he had the best opportunities of forming a correct opinion, having been for a long period in close attendance upon the testatrix, but also from his high professional standing and intelligence, and because he is one of the executors who offer the will for probate, and can have no inducement, from feeling or otherwise, to give color to the case adverse to the validity of the will.

Many years previous to the date of the will, Doct. Blauvelt, a son-in-law of the testatrix, the husband of her daughter Eliza, the caveator in this cause, died leaving an infant daughter. Upon his death-bed the testatrix had promised him that she would treat his child as one of her own children. This promise she appears to have regarded as sacredly binding. She had at different times made her will, giving to this granddaughter a share of her estate as one of her own children. The last of these wills is an exhibit in the cause. It is dated on the eighth of September, 1854, and at the time of the execution of the will in question was in the hands of her counsel, by whom it was drawn, and who was appointed one of the executors. This arrangement in favor of the granddaughter was known to her children, and was regarded by several of them as partial and unjust. The testatrix had been urged by them to alter it, but she had steadfastly refused, and had declared that while she retained her senses it should never be done. Four of the children are represented to have been particularly dissatisfied with the arrangement, and desirous to have it altered, *viz.* John, Louisa, wife of —— Fair, Charles, and Mary, the two latter residing with their mother. They remonstrated with the mother against her giving to the grandchild, as well as to its mother, who was still living, the share of a child. This state of things in the family was no secret, but seems to have been well known in the neighborhood. It is spoken of by the Rev.

Mr. Warner and several other of the witnesses. It continued for several years, and until after the return of Mrs. Fair, one of the daughters of the testatrix, from Europe. She was absent two years, and returned in May, 1858. Her sister Mary fixes the date of Mrs. Fair's return in May, 1859. But this is obviously a mistake, for the will was executed in February, 1859, when, as all the witnesses agree, she was present, and had been at her mother's the previous summer. The facts which have been stated touching the condition and circumstances of the testatrix and her family are clearly established by the evidence. Nor do they seem to be at all controverted. It is important that they should be borne in mind in estimating the force of the circumstances connected with the execution of the will and the weight of the testimony where the witnesses are in conflict.

Louisa Moore, a daughter of the testatrix, who left home a few days before the execution of the will, gives this account of some of the circumstances preceding its execution: "The opposition of the children, opposed to the will as it had been executed, was manifested by their arguing and reasoning with ma, and trying to convince her that what she had done was wrong. The influences were more especially exerted upon her mind for the last two years. She was talked to frequently, sometimes for an hour or two at a time. There was a great deal of trouble about the will, and they told ma that they wished her to write a codicil, because, they said, she had left Eliza Zabriskie what she had no right to leave her, and that was a share in the homestead, and then they said she must alter that. I left home on account of the trouble about the will, and I left her very much distressed, and as I thought completely under the control of those who were dissatisfied with the will. From what I saw of my mother, and of the influences that were brought to bear upon her, she would not have made this will if left to herself. She was not in a fit state of mind to resist the influences they brought against her to have her make this will. From

all that I saw and heard, the making of the new will was brought about by excessive persuasion, importunity, and threats."

Much of this testimony is but matter of opinion, and is entitled to consideration only so far as it is sustained by facts.

Alice H. Kelk, after stating the disposition which the testatrix informed her she had made of her property under the old will, testifies: I believe Mr. John, Miss Mary, Mrs. Fair, and Mr. Charles first suggested to her a change in that will, or the making a new one. First, she was requested to add a codicil to the will, and the doctor and minister being asked as to her capability to do it, when they said they thought she was capable, then her children told her, if she was able to prepare a codicil she was able to write a will. This might have been a few weeks or a few days before the making of the new will. When Mrs. Fair had come up to see her, after being in New York, Miss Mary told her that John was coming up the next day. She then asked Mrs. Fair what John was coming for. Mrs. Fair answered, he was coming on business, saying you have got to make a just will, and you have no right to leave a dollar to any but your children. The next day Mr. John came up, and it was talked over and arranged to have it done the next day. In the morning, the person she wished to have to make the will was away. Then she took hold of that as an excuse for not doing anything then. After that Mr. John Moore came up to her, and bid her good-bye, saying he should not see her again, or words to that effect. Then Mr. Charles took hold of the subject, saying she had done it now, that it would be worse than ever—the affair or the property would be worse than ever. Finally she seemed to think that it would be best to do the thing. The whole of this was under this excitement, and she consented to do it. Then another gentleman was fixed upon to draw the will. After it was done, she was constantly uneasy, and several times requested to have it destroyed. Finally she sent for Mr. Zabriskie, and I suppose said a dozen times each way, "destroy it," and "don't de-

stroy it." Mr. Simeon Zabriskie, Charles Moore, and myself were present. She was so bewildered that I said to her, Mrs. Moore you are not in a fit state now; let it be until you can think of it. This was the day before she had a paralytic stroke. After that, the doctor ordered that she should be kept perfectly quiet, and not conversed with at all. The precise time that elapsed between the execution of the will and the stroke of paralysis is not clearly ascertained. Three of the witnesses speak of it as being but a few days. Two others, Miss Louisa Moore and Doct. Hasbrouck, speak of it as being weeks. None of them pretends to fix the time with precision. It was probably not less than two weeks. During this period, it is clearly shown that her mind vibrated between approval and condemnation of the act that she had done. The material fact to be noted is, that during this interval she did not rest satisfied. She was constantly uneasy, and the very day before she was stricken with paralysis she sent for the scrivener, and requested the will to be destroyed.

The credibility of these two material witnesses, the nurse and the daughter, are not seriously impeached. It is said, indeed, that the one is a partizan or friend of the caveator, and the other is not of very strong mind, but nothing is suggested unfavorable to their character for veracity. Let us see, then, how far their testimony is incidentally sustained by admitted facts or by the direct testimony of other witnesses. It is clearly proved, as stated by Miss Louisa Moore, that she was absent from home at the time the will was executed. Charles and Mary were at home. The will was executed on Friday, the fourth of February. On Thursday, the day previous, John arrived from New York. Mrs. Fair came on Wednesday. On the day of the execution of the will, and on the day previous, John, Charles, Mrs. Fair, and Mary were in the house with their mother alone. No other member of the family was present, and no one else but the nurse, whose testimony we have. On the afternoon of Thursday, the contents of that will and who should be the executors were discussed and settled. In the language of

John, "the whole ground was gone over." What passed at that discussion we are left in great measure to conjecture. We know that the contents of the will were moulded to satisfy the views and wishes of those children of the testatrix who were dissatisfied with the existing will. It would naturally have been supposed that the testatrix, if this change of will had been hers, would have had recourse to her counsel, by whom the former will had been drawn; who had been appointed one of her executors, and to whose custody for safe keeping the will had been intrusted. But this was carefully avoided. It was originally proposed to add a codicil to the existing will. This was the idea of the testatrix a few days before the will was executed, and she then seemed to have no idea of changing her executors. She consulted one of them, and stated that her only object was to alter a provision which she had been led to believe was in the existing will, but which in point of fact was not there. The purpose of making a new will and of changing the executors was adopted very shortly before the will was executed. We learn from the lips of Doct. Hasbrouck, at whose instance it was done, and the motive that led to it. To the question, did John L. Moore, or any one else, consult you about being an executor before Mrs. Moore herself spoke to you—he answers, "Mr. John L. Moore and Charles Moore, if I am not mistaken, stated it would be agreeable if I would be an executor; Charles said it was the wish of the family (not of the *testatrix*, but of the family,) that the estate should be in the hands of an honest man, and out of the hands of the lawyers. He said he had no doubt they would make out of it what they called a beautiful case. I declined the position both to John and Charles." Knowing the character of the legal gentlemen who had been appointed executors of the existing will, it is easy to understand the *animus* of this whole transaction. The executors of the new will were selected and spoken to by the sons. They both called on Doct. Hasbrouck before the subject was mentioned to him by the testatrix, although he was her family physician and saw her frequently.

The scrivener was selected in the same way. John went for one counsel, who it had been agreed should write the will, and who was absent. He called of his own accord upon another, who was engaged, and then went for the scrivener who had been selected as one of the executors. Mr. Simeon Zabriskie, the scrivener, was an old neighbor and acquaintance of the testatrix. He had never been advised by the testatrix of her purpose to make him an executor. He says that John L. Moore came for him. "He told me how the will was to be drawn; told me all the provisions of the new will, as Mrs. Moore afterwards stated them to me; told me that she had made a will before, but was not satisfied with it; she wished me to come and draw another will, and wanted me and Dr. Hasbrouck to be executors. I thought this was rather strange that he should call *on me* to draw the will. I told him I would go to Mrs. Moore's probably the next day, not immediately, and hear what *she* had to say about it." It is certainly a remarkable and significant fact, that the family physician not only refuses to act as executor upon the request of the sons, but an old neighbor and friend declines to act at all at the request of the son, though he professes to come in the mother's name, but replies he will come the next day, and hear what she had to say about it. The witness adds—"Mr. Moore told me she wanted it done that afternoon, so I went with him to the house." So far from her desiring it to be done that day, Miss Kelk testifies that "she took hold of the fact, that the person whom she wished to write the will was absent, as an excuse not to do anything then, but finally, after strong influences used to operate upon her, she consented." The whole active management of the matter was obviously in the hands of the sons, not of the testatrix. She appears to have been passive in their hands. All the evidence in the cause shows that the mother did not desire to change the old will in favor of her granddaughter. She was not dissatisfied. It was her children who were dissatisfied and who urged the change—all the evidence shows this; it is denied by no one. John Moore and Mary Moore, the two

most material witnesses for the will, and who were parties to it, confirm the statement. But they allege that the mother acquiesced in the views of her children, and approved the change.

The only question is, whether that change of views was induced by undue influence? Was it induced by persistent importunity, which she was too weak to resist? Was she harassed into submission by excessive importunity? Was it assented to for the sake of peace?

We have, at the outset of this inquiry, not only the direct testimony of two witnesses, but the significant fact, that although this importunity had continued for years, while the testatrix retained her health and vigor of mind, she successfully and utterly refused to yield to the importunity or to alter her will. The importunity was successful only when the powers of her mind and body had been weakened by age and infirmity, when she was bed-ridden, blind, racked by disease, and utterly dependent upon her children. We have the further significant fact, that after the new will was executed, the testatrix was dissatisfied, and sought to destroy it. Doct. Hasbrouck testifies, that on the seventh of February, three days after its execution, she spoke to him of destroying the will. He does not give us her language in full, but it is manifest, from his reply, that she was dissatisfied with the will. "I said to her," is his testimony, "as your property, Mrs. Moore, is your own, you have a perfect right to do with it as you please; and if you have not made such a will as you think you ought to make, all you have to do is to destroy it." The witness inferred, from the reply of the testatrix to this statement, that she was not dissatisfied. Her reply was, "as to that, doctor, I don't think I can better it." The language is certainly equivocal, and admits of two very different interpretations. The testatrix has put her own interpretation upon her language, for within a day or two afterwards she acted upon the doctor's suggestion—sent to the scrivener, and requested him to destroy the will. We have the scrivener's account of this transaction, and of the

mode in which the purpose of the testatrix was defeated. "The testatrix sent for me to destroy the will, not more than a day or two after it was executed." In the time of the transaction the witness is mistaken, for he subsequently states that he is sure this occurred after he went to Jersey City, as the bearer of a note, written by Doct. Hasbrouck, at the request of the testatrix, to Mr. Zabriskie, requesting him to return the old will. This note is in evidence. It is dated on Monday, the seventh of February, three days after the date of the will, and on the day of the interview already spoken of between the doctor and the testatrix. On Tuesday, the witness went to Jersey City, and returned the same evening. It was probably on Wednesday or Thursday, nearly a week after the new will was executed, that the scrivener was sent for to destroy the will. The witness states—"I went to her house; she told me to go home, and destroy that will. I went home with the intention of destroying it according to my orders, but on my way home the thought struck me that I would not destroy it that evening, but take the will next morning and hand it to Mrs. Moore herself, and let her do what she thought proper. Charles Moore came to my house, and asked me whether I had destroyed the will. I told him I had not. He then told me his mother had said I must keep it, and let it remain where it was." Whether the mother ever gave such order to Charles does not appear. It would seem that she did not. The reason assigned by the scrivener to the testatrix for not destroying the will was, that he thought it best to bring it to her; for if he destroyed it, who would know he had destroyed it. The witness adds, "a few days after that I was in the room with the testatrix, Miss Mary, Charles, and the nurse, Miss Kirk. Mrs. Moore then told me again I should go and destroy that will. A few moments after, she told me I should not. After a few minutes, she told me again to destroy it. So then I made a move about going off. She then told me to leave it for the present. I think that was the last time I ever saw Mrs. Moore alive. She was shortly after taken very sick with

paralysis, or something like it." The witness, on a further cross-examination, accounts for this extraordinary vacillation on the part of the testatrix. He says, "Charles spoke to his mother, to induce her not to destroy the will. He said she did very wrong to destroy it. It was wicked in her to have it done. There was a good deal said about the bed, but I don't recollect particularly. His language was loud and boisterous. I thought his language very severe to a mother. In my opinion, if Charles had not interfered in the manner he did, she would have destroyed the will." This is the same interview spoken of by the nurse, Miss Kelk. She says, respecting it, after describing the conduct of the testatrix—"I had to support and restrain her. Finally, I begged her to leave it at this time until she was able to think, for she was then quite unable. Charles was present at this time, and intimidated her by violent language, telling her she never had done justice to her children, and he wondered she was not afraid God would take away her speech. This was the day previous to the stroke of paralysis. This was the last time the subject of the will was referred to by the testatrix or in her presence. She was forbidden to speak about the will after the stroke of paralysis. The children were all told, and the doctor said the subject of the will must not be mentioned to her."

False representations were also made to the testatrix of the contents of the former will, in order to induce her to make the new one. The title to the homestead lot, upon which the testatrix resided, she had derived from her father, Michael Price. She believed that she had title to those premises for life only, and that on her death they belonged to her children. It would seem, from the evidence, that she had been advised by her counsel that she had a legal title to those premises in fee. Nevertheless, by her will, she directed that her daughters might remain in possession of the homestead for one year only after her death, and that it should then descend to her heirs-at-law, as if she had died intestate. Representations were made to the testatrix, that by this will

she had given to the granddaughter a share in the homestead with her other children. Mary Moore testifies that her mother was given to understand, by Mrs. Fair and John, that she had willed a share in the homestead to her granddaughter. This the witness states was one of the first things that caused dissatisfaction in the testatrix with the then existing will. She was ready and willing to make a different appropriation of her property. She saw decidedly the injustice of that will, in leaving her granddaughter an equal share of the homestead. The testatrix said that was not her intention, and her impression was that she had not done so. But she derived from her children the impression that it was otherwise, and consulted Mr. Banta, one of her executors, upon the subject. He said it was not so. Mr. Banta testifies "that the testatrix sent for him, about a week before the making of the will, and spoke of the change she wanted made. She said they told her she had given her granddaughter Eliza an interest in the homestead equal to her children. The witness repeatedly assured her the fact was not so. She seemed to think she had made such a disposition of the homestead. She said they told her so, and almost insisted upon it, but afterwards seemed to be convinced of what was said, and was perfectly satisfied with the old will." The testatrix, it is manifest, was thus persuaded that the existing will was unjust, and was thus induced to make a new one. The force of this objection, though qualified, is not destroyed by the consideration that this influence was used, not to induce any particular disposition of the property, but simply to induce the making of a new will; that in this respect the new will is not materially different from the old one, and therefore no one was prejudiced by it. A will was in existence with which the testatrix, down to the time of making the new will, had professed herself to be perfectly satisfied, and which for years she had resisted all the importunities of her children to alter. The fact of her consenting to make a new will raises a presumption that her mind had undergone a change in regard to the provisions

of the old one, and if no other material change was made, it might raise a fair presumption that her views had changed, as it is alleged they had done in regard to the provision in favor of the caveator, the change in which constitutes the subject of complaint. The fact, moreover, that the testatrix was induced by false representations to act at all in the premises, is a proper element in the consideration of the question of undue influence.

The material circumstances relating to the procurement and execution of the will are, that the children, not the testatrix, were dissatisfied with the old will; that its contents were well known to the family, had long been the subject of complaint upon their part, and of urgent entreaty that an alteration should be made; that as long as the testatrix was in health this was resisted; it was yielded to only when the testatrix was enfeebled in mind and body by age and disease; that the children were the active agents in the procurement of the will. They met at the house of the testatrix for the purpose of having it executed without the previous request or knowledge of the testatrix; they made application to the persons intended to act as executors, and called in the scrivener, summoned the witnesses, gave directions to the scrivener for the preparation of the entire will before he had seen the testatrix; were present when the instructions were received by the scrivener from the testatrix, took an active part in giving those instructions, (so much so as to prompt the suggestion, by one of the sisters to the scrivener, that it was the will of her *mother*, not of her *brothers*, that he was preparing); importuned the testatrix not to revoke the will after it was executed—interfered to prevent the scrivener from destroying it, in compliance with the instructions of the testatrix—were present when the testatrix ordered the scrivener to destroy it, and by intimidation prevented her from having the order carried into execution. A total absence of all evidence that the testatrix ever before, or at, or after the execution of the new will in the absence of the children, by whose influence the will was

procured to be executed, ever expressed her dissatisfaction with the old will, or her approbation of the new one; or that she ever ceased, down to the hour that she was struck with paralysis, and all further conversation on the subject was forbidden, to declare that she was satisfied with the original will, and to urge that the new one should be destroyed. The circumstances under which the act was accomplished, the mode of effecting it, and the events that succeeded, are so indicative of undue influence on the part of the children that, in the absence of all direct testimony, it could hardly fail to be regarded as the result, not of free agency, but of undue influence or coercion.

There is evidence, also, that the testatrix was threatened, as well as importuned to alter her will. Her fears were directly appealed to, fears not of personal violence, but of family discord and litigation among her children. Louisa Moore testifies, that after her mother was taken sick, those that influenced her threatened her to put all the property in law, if she did not do as they told her, and they told her the world said it was an unjust will. Again she says, I heard them threaten her to put all her property in law if she did not alter her will. I heard Mrs. Fair say that it would all be put in law if she did not alter her will, and I heard Charles tell her so too. To see the full force of this evidence, and the probable effect of these threats upon the mind of the testatrix, it is necessary to revert to the testimony of John L. Moore. He testifies, that after his father's death there were law suits between him and one of his brothers respecting the father's estate. It was against the views of the mother, and she sent him word that if the suits were not stopped she would disinherit him. He believes she did disinherit him at one time, but he was afterwards reinstated in her will the same as the other children. In consequence of these difficulties, upon more than one occasion, the mother and son were not upon speaking terms. For years the son did not enter his mother's house or speak to her. How many years this continued the son does not state. But

when he first heard she was entirely blind, then he went to see her, and all coldness after that ceased. There was no formal reconciliation or explanation made; he went in and shook hands, and that was an end of the affair. This evidence shows that there had been years of estrangement between this son and his mother, growing out of litigation in the family. It enables us to appreciate the force of the evidence given by Miss Kelk, in depicting the scene between the mother and her sons, when she was finally induced to consent to an alteration of her will. After stating that the mother, on the day that the will was proposed to be executed, laid hold of the absence of the person who she wished to write the will, as an excuse not to do anything then—she says, "after that Mr. John Moore came up to his mother, and bid her good-bye, saying he should not see her again." This act, simple as it seems, must have brought back to that aged and infirm parent's heart and memory the sense and recollection of those bitter years of alienation between herself and her son. Its language was, that will must be executed to-day as I wish it, or you and I part. So it was understood by Charles, the accomplice in this wrong; for he immediately took hold of the subject by saying, you have done it now, it will be worse than ever. This language is addressed by two sons to an aged, helpless, blind, and dependent mother, to induce her to execute a will in compliance with their wishes. If that is not undue influence, what is? Would threats of personal violence be more calculated to excite fear or apprehension from a parent, or to extort an unwilling compliance with the views of her children? Would any form of coercion be better calculated to deprive her of her free will? We know that in this case it accomplished what years of argument and persuasion had failed to effect. Threats of personal estrangement and non-intercourse addresed by a child to a dependent parent, or threats of litigation between the children to influence a testamentary disposition of property by the parent, constitute undue influence.

The standard of testamentary capacity has been properly fixed at a very low point in the scale of intelligence. The right of a testator, however feeble his powers of mind or body, to the control of his property by testamentary disposition, so long as he has intelligence to exert it, has been, by the courts of this state at least, inflexibly maintained. It is right that it should be so. But it behooves a tribunal of justice, while maintaining, upon the one hand, the right of the testator to that unlimited dominion which the law gives him over his property, to resist, upon the other, with watchful jealousy all attempts to interfere with the free and untrammeled exercise of that dominion, and to see that, in the testator's hour of weakness and infirmity, the will of another is not substituted for his own.

The evidence satisfactorily establishes the fact, that the writing offered for probate was procured from the testatrix by undue influence, and is not her last will and testament.

The decree of the Orphans Court must be affirmed with costs.

JAMES VAN WINKLE, appellant, *and* HENRY SCHOONMAKER, executor of Mary D. Van Winkle, respondent.

A married woman is incapable of devising real estate. She is also incapable of disposing of her chattels by will without the consent of her husband. Such a will, being a mere nullity, will not be admitted to probate.

The wife may, with the consent of her husband, make a valid will of her personal estate, and such consent may be by parol; it may be express or implied, and may be before or after the death of the wife.

The consent of the husband is not obligatory, but is revocable at his pleasure at any time before probate granted. It is nothing more nor less than a caveat that the will be admitted to probate. If that is revoked, probate cannot be granted.

If, in consequence of the husband's assent, rights are acquired by other parties to property disposed of by the will, *it seems* that in such case he would not be permitted to retract his assent and oppose the probate.

Where a married woman made a will with the consent, and in parol by the procurement of the husband, and after the death of the wife, a day was

fixed for the reading of the will by the husband at his house, and notice given thereof to the heirs of the wife by the husband, who also knew of the will being taken to the surrogate's office for probate, and made no objection to it. The husband afterwards withdrew his consent, and filed a caveat against admitting the will to probate. The Orphans Court having admitted the will to probate, the decree of the Orphans Court was reversed.

Bradley, for appellant.

THE ORDINARY. The appeal is from a decree of the Orphans Court of Bergen county, admitting to probate the will of Mary D. Van Winkle, the wife of the appellant. The will disposes of both the real and personal estate of the testatrix. It is dated on the first of February, 1859, and was offered for probate on the twenty-fourth of March ensuing, and on that day a caveat was filed by the husband against the probate.

It appears, from the evidence, that the scrivener was requested, by the husband of the testatrix, to write the will, and was furnished by him with instructions for that purpose. After the death of the testatrix, a day was fixed for the reading of the will at the house of the husband. Notice was given by him to the heirs of his wife, and the will was read there in his and their presence. He knew of its being taken to the surrogate's office for probate, and made no objection to it.

At the time the will was executed, both the scrivener and the husband of the testatrix supposed that she had a legal right to dispose of her property, real and personal, by will. The mistake was not discovered until the will was taken to the surrogate's office for probate. The fact of the testatrix being a married woman appearing upon the face of the will, the surrogate suggested doubts in regard to its validity. He told the parties, however, that the matter might be arranged, the heirs of the testatrix being of age, by their releasing to the devisee the land devised to her under the will. The husband consented to the probate of the will, if the devises, as well as the bequests, could be carried into effect. The heirs

refused to consent to the proposed arrangement, and thereupon the husband filed a caveat against the probate. The testatrix and her husband having been married over twenty years, the case stands entirely clear of the operation of the act of 1852 for the better securing the property of married women.

As to the real estate, the will is clearly invalid. A married woman is incapable of devising real estate. 2 *Bla. Com.* 498; *Nix. Dig.* 874, § 3.

She is also incapable of disposing of her chattels by will without the consent of her husband. Such a will, being a mere nullity, will not be admitted to probate. 3 *Bla. Com.* 498; 4 *Coke's Rep.* 51, *b*; 1 *Williams on Executors* 45.

But with the consent of her husband, the wife may make a valid will of her personal estate, or even of the goods of her husband. Such consent may be by parol, may be express or implied. It may be before or after the death of the wife, as if a woman makes a will of the goods of her husband and dieth, and after the probate of the will the husband delivers the goods to the executor, he hath made it a good will, notwithstanding he was not privy to the making thereof. It shall be intended, that by the delivery of the goods by the husband to the executor according to the will, he assented to the making thereof. *Perkins on Conveyances*, "*Devises*," *ch.* 8, § 501; 1 *Swinb. on Wills* 80, *part* 2, § 9.

In the case now under consideration, the will was made with the knowledge and consent of the husband of the testatrix. His consent was given by implication, both before and after the death of the testatrix.

But it is objected that the consent is inoperative, because it was given by the husband under a mistaken apprehension of his rights. He believed that his wife had a perfect right, under the act of 1852, to dispose of her property without his consent. No consent therefore, it is said, can be implied from his acquiescence. Even his express consent, to be available, must be an intelligent consent. However consonant the objection may seem to our ideas of justice, I do not perceive

upon what principle it can rest. As a general rule, it is clear that a party cannot be relieved, even from his contract, by reason of a mistake in law. Here is a mere waiver of his interest in the property bequeathed by the wife. The husband consents that the wife shall dispose of his property, or of her property in which he has an interest.

The consent is founded upon no consideration. It is not legally binding. It may be revoked at the husband's pleasure. It is personal to the husband, and no more than a waiver of his rights as her administrator. It can only give validity to her will in case he survives his wife. But how can it be said to be void or inoperative by reason of a mistake of his rights. If no legal rights have been acquired under the consent, it is clearly inoperative. If such rights have been acquired, it is not perceived how they can be lost by reason of an error in law committed by the husband.

It is further objected that the consent is inoperative, because it was a qualified assent—an assent to the will as an entirety, valid in all its parts. This qualification was in terms annexed to the consent made, at the surrogate's office, to the probate of the will. But no such qualification was annexed, in terms at least, to the original assent made to the will at the time of its execution. If this consent could be regarded as a matter of contract—if, for example, the husband, by an express agreement, consents that the wife shall dispose of her entire estate by will, provided she bequeaths one half of it for his benefit, or in such mode as he should suggest, the failure to comply with the terms might terminate the consent. But it is not perceived how this doctrine is to operate in case of an implied consent. And if the husband consents that the wife may dispose of all her property by will, that consent cannot be invalid because a part of her property is by law incapable of being disposed of by will. There is in fact no room for the application of either of these objections. The consent is not obligatory, but is revocable at the pleasure of the husband at any time before probate granted. It is nothing more nor less than a consent

that the will be admitted to probate. If that is revoked, probate cannot be granted. 2 *Swinb. on Wills* 81, *part* 2, § 9; *Henley* v. *Phillips*, 2 *Atkyns* 49; 1 *Roper on Husb. and Wife* 170; 1 *Bright on Husb. and Wife* 65; 1 *Williams on Ex'rs* 46; 1 *Jarman on Wills* 31.

Some of the cases seem to maintain a different doctrine. *Brook* v. *Turner*, 2 *Mod.* 172.

It is reported to have been held by Sir H. Jenner Fust, in *Maas* v. *Sheffield*, that if after the death of the wife the husband does assent to a particular will, he is bound by that assent; and as a consequence of that decision, it is stated by elementary writers, that if, after the death of the wife, the husband acts upon the will, or once agrees to it, he is not, *it seems*, at liberty to retract his assent and oppose the probate. 1 *Williams on Ex'rs* 47, and *note w*; 1 *Bright* 65, and *note d.*

As applied to a particular state of facts, that may be true. If, for instance, the executor, in advance of the probate, with the assent of the husband, dispose of the property bequeathed to third persons, or if rights are otherwise acquired under the will, it may well be that the husband would not be permitted to retract his assent and oppose the probate.

But this will be found not to affect the general principle, that the consent is revocable by the husband at any time before probate.

The decree of the Orphans Court must be reversed.

JACOB SKILLMAN, one of the executors of Thomas Skillman, deceased, appellant, *and* DAVID B. SKILLMAN and WILLIAM H. SKILLMAN, respondents.

When executors, being authorized by the will of their testator to sell his real estate, advertised for sale his farm, which was sold at public auction to one S., who purchased at the request of one of the executors, who was the real purchaser, for the sum of $4500. The purchaser did not sign the contract of sale, nor were the other conditions complied with at the time, on account of objections to the sale made by the other executors,

but before the day named by the conditions of sale the real purchaser took possession of the farm, contracted for the sale of a part of it, and put the purchaser in possession, and on the day and at the place appointed for giving the deed he appeared, in compliance with the conditions, prepared to complete the purchase, but the other executors refused to make the title. After repeated unsuccessful efforts, during nine months, to procure the title, the purchaser gave notice to his co-executors that he would no longer hold himself responsible for the purchase, and requested them to re-sell the property.

About a year afterwards the purchaser was cited before the Orphans Court by his co-executors to render an account of his administration, and was ordered by the court to file an account within twenty days, charging himself with $4500, the purchase money of the farm, as assets in his hands.

On an appeal from the decree of the Orphans Court it was *held*—

1. That there was clearly no valid contract of sale; treating the executor as a stranger to the estate, the fact that the purchaser refused to sign the conditions because one of the executors refused to ratify the sale, is conclusive on that point.

2. That no subsequent act of the purchasing executor bound him. His taking possession of the farm, contracting verbally for the sale of a part of it, and putting the purchaser in possession, were manifestly done in good faith with the expectation of obtaining the title. Having failed in that, he cannot be bound by these acts as part performance or as an acknowledgment of his liability as purchaser.

3. The execution of the deed by the other executors a year after the purchase was made, and leaving it at the office of the attorney of the purchaser after he had given distinct notice that he would not accept the title, was a mere nullity.

4. The purchase of the property by one of the executors was clearly illegal. He would acquire no valid title if the deed was delivered. If he had accepted the title, and agreed to pay the price, he might not be permitted in equity to disavow the act and refuse to pay the purchase money. But no court would require an executor, against his will, to act in violation of his duty or to accept an invalid title.

5. Neither the Orphans Court nor this court has any power to enforce a specific performance of the contract, even if the executor was bound in equity to a specific performance. That question, as well as the question of the liability of the executors for a failure to sell the land and settle the estate, belongs to another tribunal.

The decree of the Orphans Court was in all things reversed, but no costs were allowed to either party, as against the other, nor were costs awarded to either party out of the estate.

J. Wilson, proctor for appellant.

B. Vansyckel, for respondents.

THE ORDINARY. On the sixth of September, 1861, Jacob Skillman, the appellant, was cited by the respondents to appear before the Orphans Court of Hunterdon county, to render an account of his administration of the estate of the testator, Thomas Skillman, deceased, and particularly of the proceeds of the sale of the real estate of said deceased. On the twenty-sixth of November, 1861, it was ordered and decreed, by the said court, that Jacob Skillman, one of the executors of said deceased, should be charged with the sum of forty-five hundred dollars (with interest from the first day of April, 1860,) the amount of the sale of certain real estate of the testator which had become assets in his hands; and it was further ordered that he should, within twenty days, file his account charging himself as decreed. From this decree the executor appealed.

The parties are all executors of their father, Thomas Skillman, and are all interested with other devisees of the testator, some of whom are minors, in the proceeds of the sale of his real estate, which, as executors, they were by the will authorized to sell. On the tenth of January, 1860, the homestead property of the testator was exposed to sale at public vendue. By the conditions of sale, signed by all the executors, the title was to be made, and the papers exchanged on the second of April then next. At the close of the sale, the purchaser was to give his note, with approved security, for one-tenth of the purchase money, payable on the second of April, as part payment. One half of the purchase money was to be paid in cash on the delivery of the title, and the balance secured by a bond and mortgage, payable in one year with interest, or in cash, at the option of the purchaser. The property was struck off to John J. Sutphen, for forty-five hundred dollars, he being the highest bidder. The bid was made by Sutphen for the appellant, and at his request. The conditions of sale were not signed by Sutphen, nor was a note signed in compliance with the conditions, David B.

Skillman, one of the executors, objecting to the sale. In March, 1860, the appellant, who was the real purchaser, contracted for the sale of five acres of the premises, and gave the vendee possession. On the first of April he took possession of the land, and on the second of April, in compliance with the conditions, he appeared at the place designated prepared to complete the purchase, but David B. Skillman, one of the executors, refused to sign the deed. After repeated but unsuccessful efforts to procure the completion of the title, on the thirty-first day of December, 1860, the appellant gave to his co-executors written notice that he would no longer hold himself responsible for the purchase, and requested that the same might be advertised and sold without delay. He subsequently proposed to accept the title and pay the purchase money upon certain stipulations, but the offer was not accepted by his co-executors.

The Orphans Court, in making their decree, must have proceeded upon the ground that the appellant was bound by his contract or by his subsequent acts for the purchase of the property, and that they were authorized to compel, upon his part, a specific performance of the contract.

They were clearly in error upon both points.

1. There was clearly no valid contract of sale. Admitting that, as executor, the appellant might lawfully purchase, or, that having purchased, he could not object to his own illegal act, treating him as a stranger to the estate, there was no valid contract for the purchase of the land. This is clearly proved by the testimony of the crier at the sale, and of Sutphen, the person at whose bid the property was struck off. They both testify that there was no valid sale. The purchaser refused to sign the conditions, because one of the executors refused to ratify the sale. The fact that the conditions of sale were not signed, nor the terms of sale in any respect complied with, are conclusive upon this point.

2. No subsequent act of the executor bound him. Though not bound by the sale, he manifestly was desirous of acquiring title, and expected to do so. He made repeated efforts, by

himself and through his attorney, to this end. With this expectation he took possession of the land, and contracted verbally for the sale of part of it, and put the purchaser in possession. There is no reason to doubt that this was done in good faith with the expectation of obtaining title. He failed in that object, and cannot be bound by these acts as part performance, or as an acknowledgment of his liability as purchaser.

3. The execution of the deed by the executor, a year after the purchase was made, and leaving it at the office of the attorney of the purchaser, after he had given distinct notice that he would not accept the title, was a mere nullity. The attorney had no authority to accept the deed. He was not the agent of the purchaser for that purpose. He so expressly testifies. The deed has never been tendered to or accepted by the appellant, or by Landis, the grantee named in the deed.

4. The purchase of the property by one of the executors was clearly illegal. He would acquire no valid title if the deed were delivered. If he had accepted the title, and agreed to pay the price stipulated, he might not be permitted in equity to disavow the act and refuse to account for the purchase money. But no court would require an executor, against his will, to act in violation of his duty or to accept an invalid title.

5. Neither the Orphans Court nor this court has any power to enforce a specific performance of the contract, even if the executor was bound in equity to a specific performance.

That question, as well as the question of the liability of these executors, or either of them, for a failure to sell the land and settle the estate, belongs to another tribunal.

The decree of the court below must be in all things reversed. No costs should be allowed to either party, as against the other, nor should either party be suffered to have the costs of this controversy between themselves allowed as against the estate.

CASES

ADJUDGED IN

THE PREROGATIVE COURT

OF THE STATE OF NEW JERSEY,

OCTOBER TERM, 1862.

In the matter of the assignment of dower of ANN GARRISON, widow of Richard Garrison, deceased.

On an application on behalf of an infant devisee to this court to set aside the report of commissioners assigning dower to the widow of testator, on the ground of inequality and illegality in the mode of making the assignment, it was *held*—

That the statute authorizing the assignment of dower by commissioners was not designed to affect the legal rights or interests of the parties in the subject matter, nor to deprive either party of any protection against an infringement of those rights. It was designed to leave the power of the court over the proceedings of the commissioners so broad and unlimited as to afford to all parties concerned as full protection to their rights as they were entitled to under the subsisting modes of procedure, either at law or in equity.

The court must have power under the statute to administer all the relief, legal or equitable, against an illegal or unjust assignment of dower to which the doweress or the tenant was previously entitled. Relief may be granted, at the instance of either, against any act of the commissioners prejudicial to the legal rights of any party concerned in the proceedings.

In this case testator devised to his son and to each of his three grandchildren distinct farms and portions of real estate subject to the widow's right of dower. The commissioners assigned an entire farm, which was devised to one of the minors as a portion of the widow's dower. Nearly

In matter of Ann Garrison.

one half of the land devised to this minor was assigned to the widow for her dower, and much less than one-third in value of the land of other devisees was so assigned, although the whole land assigned to the widow did not exceed one-third of the whole land of which testator died seized. *Held*, that the assignment was illegal. No more than one-third of the land of each tenant must be assigned to the widow for her dower. Each of the tenants is equally entitled to relief, whether the assignment is illegal and unequal, as between the widow's dower and the entire estate, or only as between the dower and the interest of the several tenants individually.

Carpenter, for heir.

Browning, for widow.

THE ORDINARY. Richard Garrison, of the county of Cumberland, died seized of a large real estate, consisting of several distinct farms and parcels of land situate in the counties of Salem and Cumberland. He left surviving him a widow, a son by his surviving wife, and three infant grandchildren, the children of a deceased daughter by a former marriage. By his will he gave to his son and to each of his three grandchildren distinct farms and portions of real estate subject to the widow's right of dower. On the application of the guardian of the three grandchildren, commissioners were appointed by this court to admeasure and set off the one-third part of the said real estate, as the widow's dower therein. Dower having been assigned, application is now made by the guardian, on behalf of the infants, to set aside the report of the commissioners, and the assignment made by them, as illegal and unjust.

It appears, by the evidence which has been taken in support of the application, that the commissioners assigned an entire farm, which was devised to one of the minors, as a portion of the widow's dower. It also appears that nearly one half of the entire value of the real estate devised to this minor, consisting of the said farm and of several other tracts and pieces of arable, marsh, timber, and bush land, was assigned to the widow as her dower, while much less than one-

third in value of the lands of the other devisees were assigned to the widow. It is not claimed that there has been assigned to the widow more than one equal third in value of the entire real estate of which her husband died seized, but that the assignment is illegal and unjust in its operations upon the rights of the several owners of the land.

Two questions were raised upon the argument, *viz.* 1. Has the court power to interfere with the admeasurement of dower by the commissioners for the reason assigned. 2. Is the assignment illegal or inequitable.

1. It is conceded that there are grounds upon which the court may deal with the acts of the commissioners. The power is expressly reserved by the statute. The report of the commissioners is to be recorded, if approved, and confirmed by the court which appointed them, and all persons concerned are concluded by the judgment or decree of *the court*, not by the report of *the commissioners*. The limits of the power of the court over the proceedings of the commissioners are not defined by the statute. The design of the legislature, in authorizing this mode of proceeding, was doubtless to furnish a simple, economical, and expeditious mode of assigning dower without resort to the more formal and dilatory methods previously in use. The statute was not designed to affect, nor does it purport to affect the legal rights or interests of the parties in the subject matter, nor to deprive either party of any protection against an infringement of those rights. It was doubtless designed to leave the power of the court over the proceedings of the commissioners so broad and unlimited as to afford to all parties concerned as full protection to their rights as they were entitled to under the subsisting modes of procedure, either at law or in equity. The court must have power, under the statute, to administer all the relief, legal or equitable, against an illegal or unjust assignment of dower to which the doweress or the tenant was previously entitled. Relief may be granted, at the instance of either, against any act of the commissioners prejudicial to the legal rights of any party concerned in the

proceedings. It is urged, that although the court may legally interfere with the proceedings where more or less than one-third of the entire real estate in which the widow is entitled to dower has been assigned to her; yet where the admeasurement of dower, as between the widow and the heirs or devisees of the entire estate is just, and proportioned to their respective rights, the court have no power of control, however unjust or unequal the assignment may be in its operations upon the interests of the several tenants. This is unquestionably placing the construction of the statute upon too narrow ground. It would practically operate to effect a radical change in the legal rights of the doweress and the tenants.

At the common law, if the freehold of which dower is demandable be in the possession of divers persons by different titles, the wife, in a writ of dower brought against one of them, shall recover but a third part of the freehold which is in his possession, so that the tenant of parcel of the freehold of which the woman is dowable shall not be charged according to the possession of the whole freehold against his will. *Perkins*, § 423; 9 *Viner's Ab.* 258, *Dower X* 18.

According to common right, the widow ought to have only a third part of every manor for her dower, though it may be assigned otherwise by consent. *Perkins*, § 330; 9 *Viner's Ab.* 260, *Dower Y* 4; *Bacon's Ab.*, *Dower D* 2; *Park Dower* 255, 262; 2 *Sellon's Prac.* 211.

If the sheriff, instead of a third part, assign a moiety, the tenant has remedy against the sheriff by assize, or he may have a *scire facias* against the sheriff to assign *de novo*. *Viner's Ab.* 258, *Dower X* 17.

And if the assignment is fraudulently made by the sheriff equity will relieve. *Hoby* v. *Hoby*, 1 *Vernon* 218.

Had the widow sought to recover her dower by writ of dower *unde nihil habet*, she must have proceeded against each tenant separately, and could only have recovered the one equal third of each separate tract or parcel. *Perkins* 423; *Fosdick* v. *Gooding*, 1 *Greenl.* 30; 1 *Washb. on Real Estate* 230.

So under the statute, either any heir or the guardian of any minor child entitled to an estate in the land, or any purchaser may apply for the appointment of commissioners to assign dower in the land in which he is interested. And the guardian of any minor child or any purchaser conceiving himself aggrieved by the proceedings, judgment, or decree of an Orphans Court under the act may appeal. *Nix. Dig.* 229, § 17, 20.

It could not have been the design of the legislature, by permitting the title of the widow to dower in all the lands of which the husband died seized to be admeasured and assigned by one proceeding, to deprive the tenants of any protection to which they would have been entitled if proceeded against severally, as at common law. Nor can a guardian, by applying for admeasurement of dower under the statute in behalf of all the minor children, deprive any minor of the protection to which he would have been entitled if the application had been made on his behalf alone. And each of the tenants is equally entitled to relief, whether the assignment is illegal or unequal, as between the widow's dower and the entire estate, or only as between the dower and the interest of the several tenants individually. The principle is clearly stated and vindicated in the case of *The Creditors of Scott* v. *Scott*, 1 *Bay's R.* 504. See, also, *Wood* v. *Lee*, 5 *Monroe* 50.

It is evident that the assignment of dower, as against Charles Stretch, the tenant in fee of a part of the land in which the widow is dowable, is both illegal and inequitable. The lands devised to him by his grandfather, the husband of the doweress, consists of one entire farm and several other distinct tracts or parcels of land. The commissioners, instead of assigning to the widow the one equal third of each separate tract, or even the one equal third in value of all the tracts, have assigned to her the entire farm, and nearly one half in value of all the land devised to the minor. The assignment is in violation of common right, illegal, and unjust. In making it, the commissioners exceeded the powers con-

ferred upon them by their appointment. They were bound, in the performance of their duties, to have regard to the rights of the tenants of the freehold, and not to exercise their powers in violation of those rights.

This decision in no wise trenches upon the title of the widow to the enjoyment of all her rights as doweress. But those rights are not to be enjoyed or enforced at the expense of the rights of the tenants of the freehold. She is entitled to be endowed, as of common right, of the one equal third in value of each distinct farm or tract of land. The purchaser of each distinct tract or parcel takes subject to that right. And if the dower is otherwise assigned to the prejudice of the heir or purchaser, he is entitled to the protection of the court. Nor does this decision at all conflict with the opinion of the Supreme Court in *Laird* v. *Wilson, Penn.* 281. In that case the land of which the widow was dowable consisted at the death of the husband, of one entire tract. Admitting the authority of that case in its fullest extent, in regard to which it is not intended to express any opinion, it does not sustain the legality of the proceedings in this cause.

The report and proceedings of the commissioners must be set aside.

MARY HILLYER, appellant, *and* JESSE F. SCHENCK, appellee.

The right of appeal from a sentence or decree of the Orphans Court rejecting or admitting a will to probate, is by the statute made conditional upon its being demanded within thirty days after the sentence or decree of the Orphans Court.

The thirty days are to be computed not from the time the decision is announced, but from the time the decree was reduced to writing, signed and filed, and entered upon the minutes of the court.

The statute requiring the decrees of the Orphans Court to be signed by the presiding judge (*Nix. Dig.* 588, § 63,) was designed rather to regulate the mode in which the decree should be authenticated, and its existence verified, than to prescribe an essential requisite to the existence or validity of the decree. The decree, having been duly made and filed, may be subsequently authenticated by the signature of the presiding judge.

The demand and filing of the appeal in the court below, and not the petition of appeal in this court, is the demand of appeal intended by the act, and which, alone, is required to be made within thirty days.

The time of filing the petition of appeal is regulated by rule of court, and whenever the rule has not been complied with, the court may, in the exercise of its discretion, release the party from the effects of his *laches*.

That the appellant, by her proctor, immediately on the decision being announced by the court, and before the decree was framed or its precise terms settled, gave notice orally, in the presence of the adverse proctor, that she intended to appeal from said decision, is not a sufficient demanding of an appeal.

It *seems* that a mere oral demand of appeal, without any instrument of appeal being prepared, or entry made on the minutes, or some order made by the court, is not, according to the practice in this state, a lawful demand of an appeal.

An order made by the Orphans Court more than thirty days after the decree was signed and filed, reciting that an appeal had been demanded in open court, and directing that the said appeal be entered, and that return be made therein according to law and the practice of the court, is not conclusive that an appeal had been duly demanded, when it otherwise appears that the only demand of appeal actually made, was an oral declaration of the appellant's proctor that he intended to appeal.

The principle is of universal application, that the validity of an appeal is to be decided by the appellate tribunal.

Where the court below met by formal appointment to decide the cause, and announced the decision in the hearing of both proctors, and immediately and publicly adjourned in the presence of the proctor of the aggrieved party to an early day, that the decree might be formally prepared for signature, and again met on that day, and signed the decree, which was immediately placed on file, and there remained until after the time for appealing had expired, no *actual notice* of the signing of the decree was necessary, nor is it material whether the party aggrieved or her proctor was actually in court when the decree was signed. Parties are bound to take notice of the acts and decrees of the court regularly made.

If, however, the court had met, and made the decree privily, or without full notice to the appellant, or if the fact of the decree had been intentionally concealed from the proctor of the party aggrieved, or its existence denied, or any artifice or fraudulent practice resorted to to deprive him of the opportunity of appeal, the right of appeal would not have been lost.

Leupp and *Vroom*, for appellant.

That there was no decree, because it was not signed by presiding judge. *Nix. Dig.* 171, § 4; *Ibid.* 588, § 15, 53.

As to the time within which an appeal must be demanded. *Nix. Dig.* 579, § 16; *Clark* v. *Haines*, 2 *Green's Ch. R.* 136.

The statute gives a right of appeal for six months. *Nix. Dig.* 585, § 45.

That right cannot be taken away by rule of court. *Carpenter* v. *Titus*, 4 *Halst.* 90; *Ferguson* v. *Kays*, 1 *Zab.* 431; *Allen* v. *Joyce*, 3 *Halst.* 135; *State* v. *Judge of Bergen Pleas*, *Penn.* 737.

Speer, for respondent, cited *Nix. Dig.* 579, § 16; *Caldwell* v. *Mayor of Albany*, 9 *Paige* 572; *Barclay* v. *Brown*, 7 *Paige* 245.

As to what is a sufficient demand of appeal. *Bay* v. *Van Rensselaer*, 1 *Paige* 423; *Stone* v. *Morgan*, 10 *Paige* 615; *Delany* v. *Noble*, 2 *Green's Ch. R.* 559.

THE ORDINARY. This case comes before the court upon a motion, on the part of the appellant, for an order upon the Orphans Court to send up the papers, and upon a cross-motion to dismiss the petition of appeal. The sole question at issue is, whether the appeal was demanded within the time prescribed by the statute.

The material facts are not controverted. The decision of the Orphans Court, refusing to admit the instrument propounded as the will of Josiah Schenck to probate, was announced by the court on the twenty-fifth of March, 1862, in the presence of the proctors of the respective parties. The proctor of the appellant thereupon stated verbally that he intended to appeal from the decision. The court then adjourned, in the presence of the proctors of both parties, to the thirty-first of March, when the decree was signed, and filed with the surrogate.

On the fifth of May, the following order was made, and filed in the cause. "The appeal in the above cause having been demanded in open court, it is ordered that said appeal be entered, and that return be made therein according to law and the practice of the court."

On the third of June, application was made by the proctor of the executrix, by whom the will was offered for probate, to the court, for an order directing that the costs and charges incurred by her should be charged upon the estate, and that the original decree should be amended in that respect. The court refused to alter the original decree, but made an order that the costs should be paid out of the estate.

The petition of appeal was filed in this court on the eighteenth of November, 1862.

A decree of the Orphans Court, rejecting or admitting a will to probate, is subject to an appeal to the Prerogative Court, "*if demanded by any of the parties within thirty days* after the sentence or decree of the Orphans Court." *Nix. Dig.* 579, § 16.

The right of appeal is made conditional, upon its being demanded within the time limited by the statute.

This provision is not affected by the sixth section of the act of 1849. It is expressly provided, by the seventh section of that act, that it shall not be held to apply to cases where, by law, the time within which appeals shall be *taken* from the orders, sentences, and decrees of the Orphans Court to the Prerogative Court is now limited. *Nix. Dig.* 585.

Was the appeal in this case demanded "within thirty days after the sentence or decree of the Orphans Court?" The thirty days are to be computed, not from the time the decision is announced, but from the time the decree was reduced to writing, signed and filed, or entered upon the minutes of the court. Until then there was no decree. And if the decree was formally signed, the only mode in which the adverse party can be apprized of its existence is by its being placed on the files of the court. This was done on the 31st of March.

It is objected that no decree was lawfully made, inasmuch as it was not signed by the president judge. It is shown that the presiding judge heard the argument, and concurred in the decree as pronounced. The statute requiring the decrees of the Orphans Court to be signed by the president

judge, and declaring that the record thereof, or a duly certified copy of such record, shall be evidence in all courts of this state (*Nix. Dig.* 588, § 63,) was designed rather to regulate the mode in which the decree should be authenticated, and its existence verified, than to prescribe an essential requisite to the existence or validity of the decree. If the signature of the presiding judge is essential to the existence of the decree, it follows that no decree can be made by the Orphans Court in the absence of the presiding judge. This cannot be the true construction of the act. The decree, having been duly made and filed, may be subsequently authenticated by the signature of the presiding judge. This I understand to be the general, if not the uniform course of practice that has prevailed since the act of 1855 went into operation. Decrees are constantly made and signed by the judges who hold the court in the absence of the presiding judge.

What constitutes an appeal, or the demand of an appeal, has been the subject of much discussion and of some conflict of opinion.

In *Mecray* v. *Richardson*, at July term, 1833, cited in 3 *Green's Ch. R.* 139, the appeal was dismissed on the ground that the petition of appeal had not been filed in this court within the thirty days prescribed by the statute. And in *Delany* v. *Noble*, at October term, 1831, the petition of appeal not having been filed in this court within the thirty days, it was admitted by counsel, that if the case came within the provisions of the statute the appeal was too late, and must be dismissed. The Ordinary, deeming the case to be within the provision of the statute, and acting, probably, rather upon the admission of counsel, than upon a careful consideration of the question, dismissed the appeal. In the more recent case of *Clark* v. *Haines*, 3 *Green's Ch. R.* 136, the Ordinary refused to dismiss the appeal upon this ground, holding that the demand and filing of the appeal in the court below, and not the petition of appeal in this court, was the demand of appeal intended by the act, and which, alone, is

required to be made within thirty days. This I entertain no doubt is the true construction of the statute. The demand of an appeal is always made to the tribunal by whom the cause is decided, and from whose decree the appeal is taken.

This will appear very clearly by reference to the practice of the ecclesiastical courts, from which our Orphans Court and Prerogative Court practice is mainly derived. Thus, it is said, "in these matters of appeal there are four times to be considered. 1. The time of interposing the appeal, and that is ten days, within which time the appellant ought to appeal either before the judge by whom he is grieved or before a notary. 2. The time of desiring apostles, or letters dimissory to the appellate court, which is thirty days, within which time the letters must be requested either from the judge who decided the cause, or, if he be not found in court, before a notary. 3. The time of presenting himself before the judge (to whom it is appealed) with the appeal. 4. The time of prosecuting the appeal so interposed, which is one year, and sometimes two years, from the time of the appeal interposed." *Conset's Prac.* 186, 191, 192, *part* 5, *ch.* 1, § 1, ¶ 1, § 2, ¶ 1, ¶ 3; *Cockburn's Prac.* 234, *Appendix I*, ¶ 17.

There is an obvious analogy between this practice and our own. Thus the appellant is required—1. To appeal within thirty days after the decree. 2. To cause the proceeding to be authenticated and returned to this appellate court within twenty days from the time of entering the appeal in the court below. 3. To file his petition of appeal to this court with the register within fifteen days after entering the appeal in the court below. 4. To prosecute his appeal within the time limited by the rules of this court.

If there remained room for the possibility of a doubt upon this subject, it would be removed by the recognized form of appeal, both verbal and written, in the ancient precedents. Thus, it is said, "the party against whom sentence is pronounced may (at the very same time of pronouncing it, and before the judge doth proceed to other things) appeal with

the living voice or by word of mouth delivered and spoke, at the acts of court, before the said judge who doth pronounce the sentence (who is called the judge from whom it is appealed). And this appeal he may interpose in manner and form following, *viz:* I do dissent from the pronouncing of this sentence, and do protest as to the nullity thereof, and appeal from the same, as null, invalid, and unjust," &c. A somewhat analogous form is adopted for the written appeal, clearly showing that the appeal is made to the judge *a quo*. *Conset's Prac., part* 5, *ch.* 2, § 4, 5.

All appeals from grievances ought to be made in writing, and interposed within ten days after sentence before the judge who pronounced the sentence, if he can be come at, if not, before a notary public and proper witnesses. *Cockburn's Prac.* 234, *ch.* 36, § 1, 3, 4. See, also, *Proctor's Prac. p.* 58, *part* 2, *appeals* 159, 160, *acts, part* 3; *Cockburn's Prac., Appendix* 23, *4th inst.* 340, *ch.* 74.

I should not have deemed it necessary to say so much upon a point, which I regard as entirely free from doubt, had there not prevailed some confusion and uncertainty in our books upon the subject, which has served to create embarrassment in practice.

The failure, therefore, of the party to file his petition of appeal within thirty days from the time of the decree is clearly not within the provision of the statute. If the objection were confined to this point alone, I should have no difficulty in sustaining the appeal. The time of filing the petition of appeal is regulated by rule of court; and wherever the rule has not been complied with the court may, in the exercise of its discretion, release the party from the effects of his *laches*. In this case, I think the delay in filing the petition of appeal is satisfactorily accounted for, and creates no embarrassment in the way of sustaining the appeal. I do not understand that this objection is seriously relied upon by the appellee.

The difficulty urged against the validity of the appeal is, that it was not taken or demanded before the Orphans Court

within the time limited by the statute. Two circumstances are relied upon to support the appellant's claim to having appealed in compliance with the requirements of the statute, *viz.* 1. That the appellant, by her proctor, immediately on the decision being announced by the court, gave notice in the presence of the proctor of the caveator that she intended to appeal from said decision. 2. That the court subsequently ordered the appeal to be entered, and return made therein, according to law and the practice of the said court.

It is urged—1st, that an appeal may be made by word of mouth or *viva voce* in open court, and that such appeal is as valid as if made in writing.

The statute, it is admitted, prescribes no form of appeal. It simply requires the appeal to be made, without declaring how it shall be made or what it is. The subsisting practice of the courts must have been within the contemplation of the legislature, as in requiring a summons to be issued, an affidavit to be made, or a notice to be given. The legislature speaks of things in *esse*—of matters familiar; and we turn to the established practice of the courts to learn what they are. I am not aware that an appeal from the decree of any tribunal, legal, equitable, or ecclesiastical, ever has been, or could be taken by mere oral declaration. Whatever may be its form, it must be accompanied by some act or evinced by some writing which shall give it formal solemnity, and render it readily susceptible of proof. Thus, an appeal from a justice of the peace may be demanded *viva voce*, and entered upon the docket of the justice, by simply tendering the bond and affidavit required by the statute. And this is certainly in accordance with the spirit of our laws and the genius of our legal institutions. It is not necessary that the statute should require a summons or a notice to be in writing, because they are always written and not verbal; and the same, I apprehend, is true of appeals to the Prerogative Court—they have always been written or manifested by some formal solemnity. In this state, so far as my inquiries have extended or my experience at the bar or upon the bench has gone, ap-

peals, without exception, have been in writing. The form of the writing varies greatly; but in all cases the fact of the appeal is evinced by a written instrument tendered to the court and filed by the surrogate.

As already said, by the ancient practice of the ecclesiastical courts, an appeal might be either in writing or *viva voce*. *Conset's Prac.* 186, 229, *part* 5, *ch.* 1, § 1, *ch.* 2, § 1.

The appeal *viva voce*, however, does not rest upon a mere demand of appeal; but the appellant, after declaring that he does appeal, and desires that the apostles, or letters dimissory may be given him, he proceeds—"and of this nullity, I do also equally and principally complain to you, and require you, the notary public, (that is the register or writer of the acts) to draw me a public instrument upon this appeal thus by me interposed; and I desire the witnesses here present to give their testimony upon the premises." The register thereupon prepares the instrument, inserting the names of the witnesses. *Conset's Prac.* 234, *part* 5, *ch.* 2, § 2, ¶ 4; *Cockburn's Prac.* 246, *ch.* 37, § 1, ¶ 3, 4, *Appendix II*, 24.

Thus it will be seen that the appeal *viva voce* was not only made in the most formal manner, but that it was immediately reduced to writing and verified by witnesses.

It would be a practice somewhat in conformity with this, if upon the decree being made, the party aggrieved should at once, in the presence of the court, declare that he appealed, and the fact should at once be entered upon the minutes, and a return be ordered. Nothing of the kind was attempted by the appellant in this case. No instrument of appeal was prepared—no entry made upon the minutes—no order made by the court. Before the decree was framed, or its precise terms settled, the party declared, not that he appealed, but that he intended to appeal thereafter. No appeal was in fact made even *viva voce*—no instrument in writing was prepared—no act done to constitute an appeal.

On the fifth of May, more than thirty days after the decree had been signed and filed, the following order was made by the court: "The appeal in the above cause, having been

demanded in open court, it is ordered that said appeal be entered, and that return be made therein according to law and the practice of the court." This order, it is admitted, was made and signed in the absence of the proctor of the caveator, without notice to him, by three judges, no one of whom participated in the hearing of the appeal or in making the decree. It has not since been followed up or acted upon by the court. A return has not been made according to law or the practice of the court. It would be dangerous surely to rest the fact of an appeal upon an act thus done. But assuming it to have been made in entire good faith, as I doubt not that it was, how can it constitute a valid appeal? Standing alone, the recital and order can in themselves constitute no appeal within the statute. If the appeal was made at the time of making the order, as it is fair to infer that it was, it can amount to nothing, for it was too late, the thirty days having expired. Nor can it aid in converting the *viva voce* declaration made at the time of pronouncing the decision into a valid appeal, for the appeal must be accomplished—a perfect valid act—within the thirty days. But it is urged that the court below have themselves certified that an appeal was demanded in open court, and have made an order, based upon that fact, which this court must recognize. There is much force in this suggestion. And if the evidence of the appeal rested upon this order alone, the court would at least order the papers to be returned, that it might be seen when and how that appeal was demanded. But it was admitted, upon the argument by the counsel of the appellant, and is expressly averred in the petition of appeal, that the appeal thus alleged to have been made, and ordered to be entered, was the oral declaration made upon the decision of the case, and that no other appeal was ever made. Admitting, then, that this order was made by judges fully cognizant of the fact recited in the order; that it was made upon due consideration, and under circumstances which entitle it to the force of an express adjudication, that the *viva voce* declaration was a valid appeal within the meaning of the statute—the

facts being ascertained—the question is reduced to this, by whom is the validity of the appeal to be determined? By the judge from whom or to whom the appeal is taken. I understand the principle to be of universal application, that the validity of an appeal is to be decided by the appellate tribunal.

If, therefore, the court below had formally decided that an appeal *viva voce*, without an act done, an entry made, or a memorandum written at the time, is a valid appeal, it would not affect the result.

I should have been gratified if the court below had, in compliance with their order, sent up the original papers, that they might have been seen and inspected here. But as there is in reality no disputed fact in the case, an order now upon the court below to return the papers would create additional costs and be of no practical benefit.

There is another fact in the cause entitled to consideration, *viz.* That the proctor of the appellant was not present when the decree was signed, and that he had no actual notice of its existence till the time for appealing had expired. If the court had met, and made the decree privily or without full notice to the appellant, clearly her right of appeal would not have been lost. *Cockburn's Prac.* 352, *ch.* 39, § 1, 19.

Much more, if the fact of the decree had been intentionally concealed from the proctor of the party aggrieved, or its existence denied, or any artifice or fraudulent practice resorted to to deprive him of the opportunity of appeal, the right of appeal would not have been lost. But there is no allegation of fraud or unfair practice. The court met by formal appointment to decide the cause; the decision was made in the hearing of both proctors; an adjournment was immediately and publicly made in the presence of the proctor of the aggrieved party to an early day, that the decree might be formally prepared for signature. On the day thus designated, the court met, the decree was signed, and immediately placed on file, where it thereafter remained until the time for appealing had expired.

No actual notice of the signing of the decree was necessary, nor is it material whether the party aggrieved or her proctor was actually in court when the decree was signed. Parties are bound to take notice of the acts and decrees of the court regularly made.

As there was manifestly a *bona fide* intention to appeal, I cannot but regret that it has been lost through mere inadvertence. But the right of appeal and the terms upon which the right is to be enjoyed are alike prescribed. The rule is inflexible, and must be maintained.

The motion for an order to return the papers is denied, and the petition of appeal dismissed without costs to either party, as against the other.

CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS

OF

THE STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY.

NOVEMBER TERM, 1861.

CHARLES F. DURANT, appellant, *and* CHARLES B. F. BACOT and others, respondents.

On a bill filed to reform an alleged mistake in the description of a lot of land conveyed by deed of bargain and sale, where the allegation of complainant was, that the deed sought to be reformed was made to correct a former deed between the same parties, which was erroneous in consequence of a mistake of the parties in supposing that two streets, at the intersection of which the lot was located, intersected each other at right angles, and that the object of making the second deed was to square the lots, and to make the westerly line of complainant's lot perpendicular to one of said streets, when in fact the land conveyed by the second deed was not sufficient for the purpose intended, and that to accomplish that object would require complainant to have nineteen feet more of land on the turnpike than was actually conveyed to him, it was *held*—

That although there was some parol evidence to show that, at the time the second conveyance was made, the parties supposed it would square the complainant's lot with the turnpike, and make the westerly line perpendicular thereto, yet where there is no evidence to show that the grantor had any intention to convey more land than he did convey, or that he

would have sold more than he did, unless he had been paid an additional price, or that the grantee got less land than he bargained for or paid for the deed will not be reformed.

A deed for lands, after it has been deliberately reduced to writing, executed, acknowledged, and recorded, and has remained unquestioned for, many years, should not be disturbed or made different from what the parties made it on any feeble or inconclusive evidence.

It may well be doubted whether a court should even attempt to reform a deed upon verbal testimony alone when the alleged mistake is denied.

This case came up on appeal from the decision of the Chancellor dismissing the complainant's bill. The opinion of the Chancellor will be found in 2 *Beasley, p.* 201.

It was argued in the Court of Appeals by

J. Weart, for appellant.

A. O. Zabriskie, for respondents.

The opinion of the court was delivered by

VAN DYKE, J. The object of the bill in this case is to reform and correct an alleged mistake in the description of a lot of land, situate in Jersey City, on the north side of Newark avenue, and on the west side of Warren street, at or near the intersection of the two streets. The description is contained in a deed from John Van Vorst to William Durant, dated the twelfth day of October, 1830, which lot of land is now owned by the complainant.

The complainant alleges, in his bill, that, in the year 1827, the said John Van Vorst, for the consideration of $100, sold and conveyed to the said William Durant a lot, fifty feet front and one hundred feet deep, on the north side of said Newark avenue and on the westerly side of said Warren street, and in the corner formed by the intersection of the two streets; that, at the time Warren street, although laid out, had no visible existence, and that the precise place of its location was unknown, but that it was believed it crossed Newark avenue at right angles.

That the said William Durant took possession of the said lot, and built thereon two frame buildings, occupying the

whole of the front of the said lot; that it was afterward discovered that the said streets did not cross each other at right angles, but in such way that they would form a very acute angle at such intersection; and that, as a consequence, the buildings so erected were not wholly on the lot so conveyed, but projected over and covered other lands of the said John Van Vorst.

That to remedy this difficulty, and with intent to make the lot of Durant square on the turnpike road, and his westerly line perpendicular thereto, he, on the twelfth of October, 1830, for the consideration of $25, purchased of said John Van Vorst sufficient land on the westerly side of said lot to make the land of said Durant square with the said turnpike road, and the westerly line thereof perpendicular thereto; that the land so purchased was a certain gore piece of land, and was particularly described in the deed of conveyance for the same, as "all that certain half lot, gore, piece, or parcel of land, situate, lying, and being in the town of Jersey, in the township, county, and state aforesaid, and lying on the north side of the turnpike road leading from and through the town of Jersey aforesaid to the town of Bergen, butted and bounded on the northwesterly line of Charles F. Durant's lot, fronting on the said turnpike road twenty-six feet from the line of said Charles' lot, and thence running diagonally to the rear of said Charles' lot, forming a triangle, the base of which, lying along the line of said Charles' lot, is one hundred feet deep from said turnpike road, and the perpendicular along said road twenty-six feet;" that the object, intention, and agreement of the parties to such conveyance was to give Durant a lot fronting square on said turnpike road, and to make his westerly line thereof perpendicular thereto, and that the distance of twenty-six feet along the turnpike road was inserted in the deed upon the supposition that the same would reach a point that would make said lot square as aforesaid, and the westerly line perpendicular to said road, but that, in point of fact, it requires a distance of fifty-five feet along said road to make the lot square as aforesaid,

and to reform and correct the last mentioned deed by extending the line along said road to the distance of fifty-five feet, instead of twenty-six feet, is the object of the bill. All these allegations of the bill, so far as they charge or state that the object or intention of the parties to the deed was to make it different from what it appears to be on its face, or to extend the line on the turnpike beyond the twenty-six feet, or to make Durant's westerly line at right angles with said road, or that it was the intention of the parties to it, in any way or manner, to include any more land in the deed than the twenty-six feet front would cover, or that there was any mistake or misunderstanding about it, are all explicitly denied in the answer; and this places the complainant under the necessity of proving all the material allegations in his bill. Has he done so, is the important and controlling question in the case. It matters not what else he may have proved. If he has not proved these important matters, his case cannot be sustained.

It may be observed here that evidence to sustain such a claim should be of the most satisfactory kind. A deed for lands, after it has been deliberately reduced to writing, deliberately signed and sealed, and acknowledged and placed upon the public record of the county, and when such deed has remained unquestioned for a long period of years, should not be disturbed and altered, and made different from what the parties made it on any feeble or inconclusive evidence. It should be so clear and certain as to leave little, if anything, for doubt. Title to land by bargain and sale can only take place by writing and seal, and it may well be doubted whether a court should ever attempt to reform a deed upon verbal testimony alone when the alleged mistake is denied; but assuming that this may be done, what has the complainant proved in this case to justify the court in exercising this important but somwhat dangerous power?

The only evidence that can be considered as bearing upon the case at all is that of Jonathan I. Durant and Samuel Cassedy. According to the evidence of Mr. Durant, the object

of the parties in making the second deed was to square the lot, but this they certainly did not do—for while they added the twenty-six feet gore on the west they left the east side the same as it was before, and thereby made Durant's lot seventy-six feet in front, and fifty in the rear, which was far from being square; and if they had added fifty-five, instead of twenty-six feet on the turnpike, it would still be far from square.

The testimony of Mr. Cassedy is very much to the same purport; their object, according to him, seemed to have been to square the lot, and this was to have been done by adding more land on the westerly side. Nothing seems to have been said or done about giving up any land on the east side in compensation for what was added on the west by way of squaring the lot, and nothing appears to have been contemplated—certainly nothing was done, except to purchase additional land on the westerly side. Durant fixed the quantity which he would need to accomplish his purpose at twenty-six feet in front, and nothing in the rear. Mr. Van Vorst agreed to sell him the quantity thus named for twenty-five dollars, which he did, and made the deed acordingly. This was the whole of the transaction in substance. It may be true that all parties at the time were under the impression that the quantity thus added would make the westerly line at right angles with the road, or nearly so; but no pains were taken to see whether it were so or not, and there is not a particle of evidence to show that Van Vorst had the slightest intention of selling or conveying any more land than he did then convey, or that he would have sold a foot more of land than he did sell, unless he had been paid an additional compensation therefor, Durant got the whole length that he asked for and all that he bargained for, and he paid for nothing that he did not get. On what principle it is, then, that he now claims that which he never asked for, that which he never bargained for, and that which he never paid for, it is difficult to perceive.

I cannot see, from the evidence, that any deception was

practised or mistake made. If Durant did not think proper to have a measurement made of what he desired, but saw fit to make a guess on the subject, and it turned out that the purchase did not answer his purpose quite as well as he expected it would, it was an error of his own alone, but it furnished no reason, then or now, nor at any after time, for compelling Mr. Van Vorst or his descendants to convey to him other lands never asked for, or purchased or paid for, and without any additional compensation, so that his original design, if he had one, of having his westerly line at right angles with the road, might be carried out.

It may also be remarked of this evidence, that if it were much more clear and explicit in its terms than it is, it would still be dangerous in the last degree to rely upon in so important a matter. However intelligent and upright the witnesses may have been, they are called on, after a lapse of nearly thirty years, to detail not so much the acts of the parties, for their acts are all the other way, but to repeat the conversations they had, as well as the casual remarks of the parties. That such accounts of such conversations should be allowed to prevail over the solemn deed actually made and executed by the parties at the time would seem to be strange indeed. It would be substituting memory, in its frailest form, for the highest and most reliable evidence known to the law.

But the complainant insists that his claim is sustained by the description in the deed itself. If this were so, it would scarcely be necessary to ask to have it changed. The word "*perpendicular*," which is the only one relied on, as introduced into this description, is wholly meaningless and of no significance at all. We are informed, by the description, that the lines, courses, and distances given form a triangle, the base of which, that is the base of the triangle, is along the northwesterly line of Charles F. Durant's lot one hundred feet, and the perpendicular, that is the perpendicular of the triangle, is along the said road twenty-six feet, but what the road, which is made the perpendicular of the triangle, is perpendicular to we are in no way informed. The

natural inference is that it means perpendicular to the base, for that is the last and only other line spoken of in the description of the triangle, *as such*. If it means this, the word is very improperly used, for the base of the triangle, as given, is the easterly line of the lot thereby conveyed, which it is manifest enough is very far from being perpendicular to the turnpike road. If perpendicular to the westerly line is meant, and it does not say so, it is almost as far from the truth; for that line, made to commence twenty-six feet from the lot first conveyed, and running thence to the rear thereof, is also far from being perpendicular to the road.

But what must entirely overthrow the construction contended for by the complainant, if the deed be appealed to, is that, in describing the westerly line, it is not only not termed a perpendicular, but it is in express language called a *diagonal* line, running "diagonally" from the turnpike. Why the parties and their scriveners should have used the word diagonally, if they all understood it to be perpendicularly, it is difficult to see. The claim, then, is weakened much more than strengthened by an appeal to the deed itself. But if it were expressed in unmistakable terms that the westerly line was perpendicular to the road, it would not and could not prove that Durant did not get every inch for which he bargained and for which he paid, nor would it prove that the parties, or either of them, intended to include any more land in the deed than what is therein clearly enough expressed.

The complainant, in the argument of his own case, which he did in the most learned, scientific, and artistic manner, seems to think that he has discovered in the defendant's answer, in their evidence, and also in the opinion of the Chancellor, something that is not accordant with his views of the innumerable angles and triangles, and every other kind of angles which he exhibited, and to which he referred, something that is not exactly perpendicular, some departure from the *radius vector* or disregard of Kepler's second law. This may all be so. I shall not question it—for I do not think that either ordinary or extraordinary skill and attainments can

solve all the remarkable propositions for which he contended; but if we admit them all to be true, I do not see that they throw any light whatever on the important but very plain question on which we are to decide. I do not see that they go one step toward proving that there was any design, intention, or understanding by the parties, or either of them, to the deed of 1830, that Durant was to have fifty-five additional feet on the turnpike, instead of twenty-six, or that his deed does not cover to the full the entire area of ground that it was intended to cover.

I think, therefore, that the evidence wholly fails to sustain the claim that the complainant has made, and that the Chancellor's decision dismissing the bill is right.

For affirmance—BROWN, COMBS, CORNELISON, ELMER, KENNEDY, VAN DYKE, WHELPLEY, WOOD—8.

For reversal—None.

THE NEW JERSEY ZINC COMPANY, appellants, *and* THE BOSTON FRANKLINITE COMPANY, respondents.

Decided at November Term, 1862.

The Sussex Zinc Company agreed, under seal, to transfer to the New Jersey Zinc Company all their stock and all their property, real and personal. Both parties applied to the legislature, and procured an act authorizing it to be done. Under the agreement and act, the Sussex Company transferred to the other company all its stock, 21,849 shares, not issued to individuals, and all its stockholders transferred all their shares, 26,151, and the New Jersey Zinc Company issued a like amount, 48,000 shares, of their own stock in payment. A year afterwards, while three of the directors of the Sussex Company had not yet transferred thirty shares out of the 48,000 to the Zinc Company, they applied to the legislature, and got the name of the Sussex Company changed to that of the Franklinite Company, and 48,000 shares of additional stock, and then also transferred the said thirty shares of old stock.

Held, 1st. That, by these proceedings, the New Jersey Zinc Company became entitled in equity to all the property owned by the Sussex Company

at the time of the transfer of the stock, and that Chancery will protect the former in its use.

2d. That the Franklinite Company, as regards the property owned by the Sussex Company at the time of said transfer of stock, is a new corporation, and as such has no title, either equitable or legal, to the property the Sussex Company had so agreed to convey.

3d. If the Franklinite Company is not a new corporation, but the Sussex Company under a new name, then the increased stock, as well as the old stock, belongs in law and equity to the Zinc Company, as owners of the old stock.

A deed conveys to the Zinc Company "all the zinc ores in the following described premises," going on describingthem by metes and bounds; and then adds, "and also all the estate, right, and title of the said parties of the first part in the before described premises."

Held that it conveyed all the right of the parties of the first part in the described premises.

A deed conveys to the grantee all the zinc and other ores, except the ore called franklinite and iron ore, where it exists separate from the zinc, "to have and to hold all the zinc and other ores, except the ore called franklinite, where it exists separate and distinct from the zinc."

Held, that the deed conveys all the zinc ores when the franklinite was mixed mechanically with the zinc.

A deed conveys all the zinc and other ores, and excepts the ore called franklinite; the complainant claims a vein of ores as passing by the name of zinc, the defendants claim the same vein as excepted under the name of franklinite.

Held, that what was meant by the word zinc might be explained by evidence *dehors* the deed, and that under such evidence the vein in dispute passed under the name of zinc.

To arrive at the true construction of the word "premises," as used in this deed, it is competent for the court to resort to the previous written agreement between the parties, in fulfilment of which the deed was read, to ascertain from that what the grantors contracted to convey.—*Per* BROWN, J.

This was an appeal from the decision of the Chancellor, reported in 2 *Beasley, p.* 322.

Bradley and *Zabriskie*, for appellants.

Hamilton and *McCarter*, for respondents.

The following opinions were delivered in the Court of Appeals.

VREDENBURGH, J. The Boston Franklinite Company hold under the mortgage and sheriff's deed from the New Jersey Franklinite Company. Their cross-bill shows that the rights of the New Jersey Zinc Company are excepted out of their deed, and that they are chargeable with notice of the proceedings of the first mentioned suit, and only claim to represent the rights of the New Jersey Franklinite Company. We may therefore consider the New Jersey Zinc Company, complainants, and the New Jersey Franklinite Company, defendants, as the only litigants here, and which for brevity I shall hereafter call the Zinc Company and the Franklinite Company.

There is in the county of Sussex a tract of land, of about 92 acres, called Mine-hill. Nearly through its centre runs, north and south, a vein of ore, composed of zinc ores and a peculiar kind of iron or zinc ore called franklinite, mixed mechanically together like wheat and chaff in the same bushel.

In 1857, both parties were taking ore out of it. Chancery has perpetually enjoined the Zinc Company, and permitted the other to go on, and the question, which of these parties has in a court of equity the better right to the use of this vein, is now before us for final adjudication.

Both parties claim title through a deed, dated the 10th of March, 1848, from Samuel Fowler to a corporation called the Sussex Zinc Company. Both parties claim under this Sussex Company. The Zinc Company claim that, in 1851 and 1852, the said Sussex Company sold and transferred all their legal and equitable estate in this vein to them. The Franklinite Company claim that no such transfer was ever made to the Zinc Company, and that the legislature, on the 26th of January, 1853, changed the name of the Sussex Company to that of the New Jersey Franklinite Company, and that they, too, are the Sussex Company under a new name, and as such own this vein. Upon this issue Chancery has decreed in favor of the Franklinite Company.

The question to be solved therefore is, whether the Sussex

Company, now called the Franklinite Company, have transferred their right, equitable or legal, in this vein to the Zinc Company.

I shall first inquire as to the condition of the equitable title.

This Sussex Company was chartered in January, 1848. In 1849, another company was chartered, by the name of the New Jersey Exploring and Mining Company, whose name, in 1852, was also changed to that of the New Jersey Zinc Company, who are the present complainants. On the 4th of September, 1851, before the name of either party was changed, these two companies came together, and entered into an agreement, under their respective corporate seals, in the following words: "This agreement, made at the city of Newark, state of New Jersey, this 4th day of September, 1851, between the Sussex Company and the Exploring Company, both corporations chartered by the legislature of the state of New Jersey, witnesseth that, for the mutual interest of both the said companies, they have agreed to *unite their properties*, and to carry on their joint business under one organization, that of the Exploring Company. The Sussex Company agree hereby to convey to the said Exploring Company all the real and personal estate of the said Sussex Company, and all mines and minerals, leases and rights, and all the capital stock belonging to the said company not issued to individuals; and the said Exploring Company agree to recognize and admit the whole stock of the said Sussex Company to the same dividends as the stock of the said Exploring Company, and the individuals now holding the stock of the said Sussex Company shall be entitled, equally with the holders of the stock of the Exploring Company, to all dividends and to all the properties, both real and personal, of the said companies. The Exploring Company is to sell and dispose of the stock of the said Sussex Company not already issued, and agrees to apply the proceeds thereof in extending the manufacturing works now owned by the said Exploring Company, and to the payment of all debts or demands against

either company, and in any other way which may tend to promote the joint interest of the respective stockholders.

This union is based upon the principle of entire equality between the individual stockholders composing shareholders of each company. It is contemplated to apply to the legislature of New Jersey for an increase of capital stock of the Exploring Company to an amount equal to that of the Sussex Company; and in case of such increase, then the said stock of the said Sussex Company is to be surrendered, and the said stock of the said Exploring Company issued in lieu thereof. The real estate of the said Sussex Company and all personal property is to be transferred to the said Exploring Company, thus forming a complete union, and bringing together and uniting under one charter all the property, rights, or advantages now owned and enjoyed by both said companies. But until such legislative sanction shall be obtained, the entire management of the joint property shall be vested in the Exploring Company, and all dividends shall be declared and paid equally upon the issued stock of both companies.—In witness whereof, the presidents of the two companies have hereunto respectively set their hands and affixed the corporate seals of the respective companies the day and year first above written.

[SEAL.] JAMES L. CURTIS,
Pres't of the Exploring Company.

[SEAL.] J. ELNATHAN SMITH,
Pres't of the Sussex Company.

Witness—Thomas Duguid."

Under this agreement both parties did, at the next session of the legislature, apply and obtain, on the 12th of February, 1852, an act in the following words, *viz:* "A supplement to an act entitled, an act to incorporate the Exploring Company.

"Whereas it has been thought expedient, by parties owning certain zinc mines in the county of Sussex, state of New Jersey, for the purpose of more economically working and

developing the same, to place such mines under the management of one corporation; and whereas an arrangement by and between the Exploring Company and the Sussex Company is contemplated—in accordance with such views—

1. Be it enacted, that the Exploring Company shall hereafter be known, in fact and in name, by the name of 'the New Jersey Zinc Company,' and by that name shall hereafter be a body politic and corporate, and shall possess and exercise all the corporate powers and franchises, and be subject to all the liabilities and restrictions of the said exploring and mining companies.

2. That the New Jersey Zinc Company is hereby authorized to purchase and receive, and the Sussex Company is hereby authorized to transfer all the mines and mineral rights, or any portion thereof now held or owned by the said Sussex Company, upon such terms as the two companies may agree upon; and the capital stock of the said Zinc Company may be increased, and its stock issued for the purchase of mines and mineral rights to the amount heretofore authorized by the charter of the said companies.

3. That the directors of the Zinc Company may be increased to twelve.

4. The Zinc Company performed faithfully *all* the agreement on their part to be performed. Their part of the agreement was to recognize and admit the whole stock of the Sussex Company to the same dividends as their own stock; and in case of the increase of the zinc stock by the legislature, then the stock of the Sussex Company was to be surrendered, and the Zinc Company issue their own stock in lieu thereof. This they have fully done. Thus Major Farrington says: 'The individual shareholders of the Sussex Company, in pursuance of the agreement between the two companies, surrendered their stock certificates to the Zinc Company, and received a corresponding number of shares in the stock of the Zinc Company. The stock that had not been issued by the Sussex Company was sold by the Zinc Company, and the proceeds applied for the uses and benefits

of said company, and the act of union, as contemplated by the agreement referred to, was considered as perfected and fully consummated.'"

James L. Curtis, another of the main witnesses of the Boston Company, says: "I was one of the first directors of both the Sussex and the Exploring companies. There was an agreement entered into between them, in 1851, to transfer the property of the Sussex Company to the Exploring Company, which was carried into effect. The Sussex Company conveyed its rights to the Zinc Company. I held several thousand shares of the Sussex Company stock, and received therefor shares in the Zinc Company stock to the same amount at the time of the consolidation."

Christian E. Detmold, a witness on the part of the Zinc Company, says, that he became connected with the Zinc Company in 1852, and was its president from the beginning of 1853 until the latter part of 1856. Being shown the agreement of September 4th, 1851, says, "I am perfectly familiar with that agreement. After that was made, an act of the legislature was obtained increasing the stock of the Zinc Company $600,000, making the entire capital $1,200,000. Thereupon the stockholders of the Sussex Company surrendered their certificates of shares therein, and received in lieu thereof an equal amount of shares in the Zinc Company. I think there was $326,000 worth of new zinc stock issued in return for that amount of Sussex stock. The Sussex Company had originally $600,000 worth of stock in 48,000 shares, at $12.50 each; of that they had sold, prior to the amalgamation, 26,151 shares, and retained 21,849 shares, which latter were transferred to the Zinc Company by the Sussex Company, and the Zinc Company issued in lieu thereof, from time to time, their own stock to the same amount. The 26,151 shares of the Sussex Company, being in the hands of private stockholders, were surrendered by them to the Zinc Company, and in lieu thereof there was issued to them the like amount of the zinc stock. The Zinc Company received no other consideration for the stock which

they thus issued to the private stockholders of the Sussex Company but the Mine-hill property. The stockholders of the Sussex Company never paid any money for that stock. The price at which the stock of the Zinc Company was then selling was par and above par. I purchased at that time 1100 shares of them, and gave 12⅞, twelve dollars and fifty cents being par.

The Zinc Company recognized the agreement of the 4th of September, 1851, as binding, and acted accordingly. They recognized it, and carried it out in good faith, and the stockholders who received zinc stock for Sussex stock have fully participated in all the profits made by the Zinc Company ever since."

Mr. Aitkin, another witness for the Zinc Company, says, he has been president of the Zinc Company since December 12th, 1857, and has been a director since 1854; that before he became a director, all the 48,000 shares of the Sussex Company had been surrendered to the Zinc Company, and zinc stock had been issued therefor, with the exception of a few shares standing in the name of a person of unsound mind incapacitated to act, but that all the shares of the Sussex Company have equally participated in the dividends of the Zinc Company ever since he has been a director.

So that, according to the witnesses on both sides, in the spring of 1852, a year before it is alleged the Sussex Company got their name changed to that of the Franklinite Company, the Zinc Company had paid to the Sussex Company every dollar of their large amount of purchase money, either by actually issuing their own stock in exchange for that of the Sussex Company, or recognizing it as their own, and paying dividends on the whole.

What is the actual value of the consideration money thus given by the Zinc Company to the Sussex Company under this contract, and for which the Sussex Company were to transfer to them all their stock and all their property, real and personal? There were in the hands of the stockholders of the Sussex Company, in the spring of 1852, stock issued

to them to the amount of 26,151 shares, which, at $12.50 per share, amounted to $326,887. For this the Zinc Company issued to these stockholders their own certificates of consolidated stock to an equal amount, *viz.* $326,887. Mr. Detmold testified that the stock of the Zinc Company was selling at that time at par and above par; that he purchased at that time, and paid over par for $14,000 of the stock. To this I find no contradiction in the evidence. If this be true, the Zinc Company paid to the Sussex Company over $326,887 in actual value upon this agreement. The only other witness I find who speaks to this subject is Col. Curtis, a witness for the defendant, who says, that at the date of the agreement, September 4th, 1851, the stock of the companies was selling at from $6 to $6½ per share—so that, even taking this estimate, the Zinc Company must have given $163,443, or thereabouts, in actual value under this agreement. But Mr. Curtis was speaking of the value at the date of the agreement, September 4th, 1851, and Detmold, at the time of the consolidation, in the spring of 1852, which may account for the difference in their statement of value.

But this is not all the consideration the Zinc Company gave under and to perform this agreement. There were 21,849 shares of the Sussex Company stock unissued to individuals. These the Zinc Company also took and used under the agreement for the equal benefit of the stockholders of both companies. The effect of this was, that as long as the Zinc Company did not issue their increased stock to represent these 21,849 shares, those who received zinc stock in exchange for Sussex stock received so much larger dividends, and the original stockholders of the Zinc Company so much the less; and when sold, for every $100 got for them, those who had exchanged Sussex stock for zinc got $25, or thereabouts. Before the consolidation the Zinc Company declared dividends only on 48,000 shares, and after the consolidation on 96,000 shares; so that if they got nothing from the Sussex Company in exchange, as the Boston Company now contend for, they just sunk half their capital by the operation.

If the witnesses speak the truth, the Zinc Company must have given, in the performance of this agreement and as consideration money for this vein of ores, over $400,000 in actual value to the Sussex Company, or rather to their stockholders. At any rate, be it more or less, there is no dispute about this, that the Zinc Company performed, to the very letter and to the entire satisfaction of the Sussex Company, and of every one of its stockholders, the contract on their part to be performed. Not a whisper, through this large volume of 600 pages, has been lisped by any person or interest, or even on the argument, that the Zinc Company did not perform in the most strict and honorable manner the *whole* agreement on their part.

Having thus seen what was done by the Zinc Company in performance of this agreement and act on their part, let us now see what was done by the Sussex Company on their part to be performed. In the first place, the stockholders of the Sussex Company transferred or surrendered to the Zinc Company all their stock in the Sussex Company, amounting to 26,151 shares, and took that amount of the consolidated stock of the Zinc Company in exchange. In the second place, the Sussex Company transferred or surrendered to the Zinc Company all their stock, amounting to 21,849 shares, not yet issued to individuals, and the Zinc Company issued their own consolidated stock from time to time in lieu thereof, and applied its proceeds strictly according to the agreement for the equal benefit of the stockholders of both corporations. These facts are abundantly established by the evidence. Thus Major Farrington says: "After the conveyance of the property, the individual shareholders in the Sussex Company, in pursuance of the agreement, surrendered their stock certificates to the Zinc Company, and received a corresponding number of shares of the stock of that company. The stock which had not been issued by the Sussex Company was sold by the Zinc Company. The proceeds applied for the uses and benefits of that company (of course the consolidated company), and the act of union, as contemplated by the agree-

ment referred to, was perfectly and fully consummated.' Again he says, "after the act of the legislature, the shareholders of Sussex stock surrendered their certificates for those of the Zinc Company. In this manner the whole of the stock of the Sussex Company became converted into shares in the Zinc Company almost immediately, except about thirty shares, and and the whole of it ultimately. The agreement was finally carried out between the companies."

James L. Curtis, a witness for the defendant, says: "There was an agreement, in September, 1851, to transfer the property of the Sussex Company to the Zinc Company, which was carried into effect. The Sussex Company conveyed its rights to the Zinc Company. I held several thousand shares of the Sussex stock. I received therefor shares in the Zinc Company stock to the same amount at the time of the consolidation."

Mr. Detmold says: "The Sussex Company surrendered their certificate of shares therein, and received in lieu thereof an equal amount of shares in the Zinc Company. There was $326,000 worth of new zinc stock issued in return for that amount of Sussex Company stock. The Sussex Company had originally $600,000 worth of stock in 48,000 shares, at $12.50 each; of that they had sold, prior to the amalgamation, 26,151 shares, and retained 21,849 shares, which latter were transferred to the Zinc Company by the Sussex Company, and the Zinc Company issued from time to time their own stock in lieu thereof. The 26,151 shares of the Sussex stock, being in the hands of private stockholders, were surrendered by them to the Zinc Company, and in lieu thereof was issued to them the like amount of zinc stock. The Zinc Company received no other consideration for the stock which they thus issued to the private stockholders of the Sussex Company but the Mine-hill property. The stockholders of the Sussex Company never paid any money for that stock. The stock was then selling above par." It is admitted, on all sides, that the Zinc Company or its stockholders now hold, under the agreement of September 4th, 1851, and the

said act of 1852, every share of the 48,000 shares of the Sussex Company and every fraction of every share honestly, justly, and fairly, and that the Sussex Company and their stockholders have received every cent which was to be given them in return, amounting, as we have seen, to over $400,000 in actual value upon what they are at this moment, and have been for the last ten years receiving their regular dividends equally with the original stockholders of the Zinc Company; that the Zinc Company and its stockholders so hold the shares of the Sussex Company so transferred under and precisely according to said agreement of September, 1851, and the act of 1852. There has never been the slightest intimation that a single share, or fraction of a share, was transferred to the Zinc Company, or is now held, under any misapprehension or mistake whatever. Under these circumstances, which of these parties, the Zinc Company or the Franklinite Company, is the owner in equity of this vein of ores? By the terms of said agreement, the Sussex Company agree to convey to the Zinc Company all their real and personal estate, and all mines, minerals, leases, and rights, and all their capital stock, and the Zinc Company agree to recognize and admit the whole stock of the Sussex Company to the same dividends as their own; they agree to get an act of the legislature to enable them to carry out such agreement. The Sussex Company, by the agreement, put the Zinc Company into present possession of this very vein of ores. Both parties, in pursuance of the agreement, apply to the legislature, and get an act enabling them to carry out such agreement. The Zinc Company perform the whole agreement on their part, and the Sussex Company and their stockholders pass over to the Zinc Company all their stock, and receive the stock of the Zinc Company in return In whom do these facts vest the equitable titles to all the property of the Sussex Company, including this vein of ores? Most clearly in the Zinc Company—and that from two considerations. In the first place, for a very valuable consideration, the Sussex Company, by the very terms of the agreement of 1851, agreed

to convey to the Zinc Company all their real estate, and put them into present possession of the same, and the Zinc Company paid, and the Sussex Company received the whole consideration money. Under these facts, the Sussex Company can only stand seized of the real estate to the use of the Zinc Company, and equity will protect such equitable estate and its enjoyment, and use even against the trustee, if he undertakes to use it adversely to the *cestui que use*.

In the second place, the Zinc Company hold all the stock of the Sussex Company rightly and justly, or its stockholders do. If the Sussex Company hold the legal title to the land, its stockholders hold the equitable title, and here all its stock has been assigned or transferred to the Zinc Company. The Zinc Company therefore, both by virtue of the agreement to sell and by virtue of its being the owners of all the stock of the Sussex Company, is in equity the owner of all its real estate, and entitled to its exclusive use. It is indifferent, therefore, in the present case, whether the Sussex Company owns the title or not, the complainants are entitled in equity to be protected in its use.

Let us now see upon what grounds the Franklinite Company attempt to get clear of this equitable title. The original stock of the Sussex Company was 600,000 shares, of $12.50 each. These have been all sold and surrendered to the Zinc Company; but the Franklinite Company contend, that after said act of 1852, two or three of their directors delayed transferring thirty shares out of the 48,000 until 26th January, 1863, when they got the legislature to pass an act, of which the following is a copy: "A further supplement to an act entitled, an act to incorporate the Sussex Zinc and Copper Mining and Manufacturing Company.

Be it enacted, that the name of the Sussex Zinc and Copper Mining and Manufacturing Company be and the same is hereby changed to that of the New Jersey Franklinite Company, and that said company be and is hereby authorized to increase its capital to $1,200,000, to be divided into shares of $12.50 each."

Let us now see who got these certificates of new shares issued by the Zinc Company to the stockholders of the Sussex Company for their stock. There were 26,140 shares issued altogether by the Sussex Company to individuals. Of these, 20,000 shares were issued to Samuel Fowler, as consideration money for the deed of the 10th March, 1848, conveying this property to the Sussex Company. James L. Curtis swears that he also had several thousand shares, and Major Farrington, who was a director in both companies, perhaps held the balance. Curtis, Farrington, and Fowler were all of them directors in the Sussex Company when this stock was transferred, so that, by this arrangement, these three directors of the Sussex Company must have received, in the year of 1852, from the Zinc Company stock to the amount of about $326,000 in actual value. What did they do with the zinc stock they thus got in exchange for their Sussex stock? Farrington says his connection with the Zinc Company ceased in 1853. We find Curtis, early in 1853, out of the direction of the Zinc Company, and president of the Franklinite Company, and had, he said, a very large interest in that company. We also find Fowler a very large stockholder in the Franklinite Company very shortly after, and hear no more of his connection with the Zinc Company. We may therefore safely infer that, very shortly after they received this $400,000 in new zinc stock, they also parted with this new zinc stock, which thus passed to other *bona fide* purchasers, and who are part of the persons in real interest here now defending their rights thus acquired in the Zinc Company; and now these two or three directors, Curtis, Farrington, and Fowler, having thus put into their own pockets $400,000, thus derived from the Zinc Company, and having put upon the Zinc Company all the debts of the Sussex Company, and all its stockholders too, what do these three gentlemen do? We will tell it in their own language, for we should hardly believe it upon other evidence. Major Farrington tells us in the most innocent manner, as if he could see nothing unusual or wrong about it, that after the act of the 12th of February, 1852, authorizing the consolidation of the

Sussex and Zinc corporations, that all the shareholders holding certificates of Sussex Company stock surrendered their certificates for those of the Zinc Company. In this manner the whole of the stock of the Sussex Company became converted to shares of the Zinc Company almost immediately, except about thirty shares, and the whole of it ultimately.

Several of us, who were in the board of directors of the Sussex Company *delayed* transferring over these *thirty* shares to the Zinc Company *for the purpose of delaying an organization of the Sussex Company until the action of the* legislature could be had by which the *Franklinite Company was formed*, and that, at the next session of the legislature, *we* (that is these two or three directors) *applied for a supplement to the charter of the Sussex Company*, which was granted; and among its provisions was one changing the name of the Sussex Zinc Company to that of the Franklinite Company, which was immediately organized after the passage of the act.

Now these two or three directors seize upon all these 48,000 shares of additional stock authorized as we have seen by the said act, and under and by virtue of it, are now claiming in a court of equity to hold all the property which the Sussex Company had agreed to convey to the Zinc Company, and for which the latter company had paid every dollar of consideration money. Can we conceive a more gigantic fraud than is thus attempted to be practised by these two or three directors under this act of the legislature? They pocket from the Zinc Company several hundred thousand dollars, under an agreement to transfer to the Zinc Company all the stock and all the property of the Sussex Company, and they do actually pass over to them the whole 48,000 shares of the original stock of the Sussex Company, but delay transferring about thirty shares thereof for a short time for the purpose, as they imagine, of keeping the Sussex Company alive until the next session of the legislature. These two or three directors then get an act changing the name of the Sussex Company to that of the Franklinite Com-

pany. Having then no further use for the thirty shares, they then pass them over, too, to the Zinc Company at the agreed price. Then seizing upon the whole 48,000 shares of increased stock, upon an allegation that the legal title to the land owned by the old Sussex Company had not been legally transferred under the agreement of 1851 and the said act of 1852, claim to own again all the old property of the Sussex Company, and are now actually here pressing us, sitting as a court of equity, to protect them in its use.

Little could the Zinc Company imagine the innumerable woes lurking under this apparently accidental delay in transferring only thirty shares out of 48,000,—little could they dream that in the scientific alembic of Major Farrington's brain this innocent delay should work such magic results as to deprive them of all their stock represented. Before the Sussex Company got their name changed to that of the Franklinite Company, all its stock, 48,000 shares, belonged, in law and equity, to the Zinc Company. This all parties contend for and admit. This the Franklinite Company contend for as well as the Zinc Company. The Franklinite Company repudiate, equally with the Zinc Company, that the old stock of the Sussex Company, transferred as aforesaid, had any vitality after the transfer. The very corporate existence of the Franklinite Company is based upon that idea. The Franklinite Company claim to own this vein of mixed ores, not under the old stock, but under the new. I repeat that, on the 26th January, 1853, the old $600,000 of the Sussex Company's stock (if the Sussex Company had not ceased to exist by virtue of the execution of the agreement of September 4th, 1851,) belonged to the Zinc Company. But on that day the legislature changed the name of the Sussex Company to that of the Franklinite Company, and *presto* it is claimed that the property represented by this $600,000 of old stock which belonged to the Zinc Company the moment before, belonged to the Franklinite Company the moment after. Thus by a stroke of the pen, in an instant, without consideration, without even saying by your

of said company, and the act of union, as contemplated by the agreement referred to, was considered as perfected and fully consummated.'"

James L. Curtis, another of the main witnesses of the Boston Company, says: "I was one of the first directors of both the Sussex and the Exploring companies. There was an agreement entered into between them, in 1851, to transfer the property of the Sussex Company to the Exploring Company, which was carried into effect. The Sussex Company conveyed its rights to the Zinc Company. I held several thousand shares of the Sussex Company stock, and received therefor shares in the Zinc Company stock to the same amount at the time of the consolidation."

Christian E. Detmold, a witness on the part of the Zinc Company, says, that he became connected with the Zinc Company in 1852, and was its president from the beginning of 1853 until the latter part of 1856. Being shown the agreement of September 4th, 1851, says, "I am perfectly familiar with that agreement. After that was made, an act of the legislature was obtained increasing the stock of the Zinc Company $600,000, making the entire capital $1,200,000. Thereupon the stockholders of the Sussex Company surrendered their certificates of shares therein, and received in lieu thereof an equal amount of shares in the Zinc Company. I think there was $326,000 worth of new zinc stock issued in return for that amount of Sussex stock. The Sussex Company had originally $600,000 worth of stock in 48,000 shares, at $12.50 each; of that they had sold, prior to the amalgamation, 26,151 shares, and retained 21,849 shares, which latter were transferred to the Zinc Company by the Sussex Company, and the Zinc Company issued in lieu thereof, from time to time, their own stock to the same amount. The 26,151 shares of the Sussex Company, being in the hands of private stockholders, were surrendered by them to the Zinc Company, and in lieu thereof there was issued to them the like amount of the zinc stock. The Zinc Company received no other consideration for the stock which

They were the workers in the hive—they were the silk-worms painfully weaving their shrouds of silken thread, while this Franklinite Company toils not, neither does it spin—not an ounce of its boasted franklinite has it ever yet yielded to the demands of commerce. It springs at once into the butterfly stage of its existence, whose only object in life is to spread its golden wings to the glittering sunshine and multiply its worthless species. I conclude that this act of the legislature, changing the name of the Sussex Company to that of the Franklinite Company, and adding another $600,000 to its stock, however it may continue down to the Franklinite Company any scintilla of legal title remaining in the old Sussex Company, cannot alter the condition of the questions of equitable right—that the broad fact still remains, that before this act was passed the Sussex Company had agreed to sell the vein in question to the Zinc Company, had received the whole consideration money, had transferred to the vendee all its stock and put him in possession, and if it had not transferred all its legal title, it ought so to have done, and equity will treat it as if it had.

Nor can the Franklinite Company claim any rights, legal or equitable, in the old property of the Sussex Company by virtue of the increased stock. The Franklinite Company must say, either that they are the old Sussex corporation or a new corporation. If they are a new corporation, then they can have no rights whatever in the old stock or the property of the old company—they are neither its devisee or its heir. But suppose the Franklinite Company are, as they claim to be, the old Sussex corporation under a new name, there are some legal consequences which I apprehend the Franklinite Company have not entirely digested.

If the Franklinite corporation is the old one under a new name, who are its stockholders—and of the increased stock, as well as the old, how did the individuals who have been pretending to deal in it get it? Before the name was changed or stock increased all the stock of the corporation belonged to the Zinc Company or its stockholders. To whom did the increased

to them to the amount of 26,151 shares, which, at $12.50 per share, amounted to $326,887. For this the Zinc Company issued to these stockholders their own certificates of consolidated stock to an equal amount, *viz.* $326,887. Mr. Detmold testified that the stock of the Zinc Company was selling at that time at par and above par; that he purchased at that time, and paid over par for $14,000 of the stock. To this I find no contradiction in the evidence. If this be true, the Zinc Company paid to the Sussex Company over $326,887 in actual value upon this agreement. The only other witness I find who speaks to this subject is Col. Curtis, a witness for the defendant, who says, that at the date of the agreement, September 4th, 1851, the stock of the companies was selling at from $6 to $6½ per share—so that, even taking this estimate, the Zinc Company must have given $163,443, or thereabouts, in actual value under this agreement. But Mr. Curtis was speaking of the value at the date of the agreement, September 4th, 1851, and Detmold, at the time of the consolidation, in the spring of 1852, which may account for the difference in their statement of value.

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Let us now see upon what grounds the Franklinite Company attempt to get clear of this equitable title. The original stock of the Sussex Company was 600,000 shares, of $12.50 each. These have been all sold and surrendered to the Zinc Company; but the Franklinite Company contend, that after said act of 1852, two or three of their directors delayed transferring thirty shares out of the 48,000 until 26th January, 1863, when they got the legislature to pass an act, of which the following is a copy: "A further supplement to an act entitled, an act to incorporate the Sussex Zinc and Copper Mining and Manufacturing Company.

Be it enacted, that the name of the Sussex Zinc and Copper Mining and Manufacturing Company be and the same is hereby changed to that of the New Jersey Franklinite Company, and that said company be and is hereby authorized to increase its capital to $1,200,000, to be divided into shares of $12.50 each."

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Sussex and Zinc corporations, that all the shareholders holding certificates of Sussex Company stock surrendered their certificates for those of the Zinc Company. In this manner the whole of the stock of the Sussex Company became converted to shares of the Zinc Company almost immediately except about thirty shares, and the whole of it ultimately.

Several of us, who were in the board of directors of the Sussex Company *delayed* transferring over these *thirty* shares to the Zinc Company *for the purpose of delaying an organization of the Sussex Company until the action of the* legislature could be had by which the *Franklinite Company was formed*, and that, at the next session of the legislature, *we* (that is these two or three directors) *applied for a supplement to the charter of the Sussex Company*, which was granted; and among its provisions was one changing the name of the Sussex Zinc Company to that of the Franklinite Company, which was immediately organized after the passage of the act.

Now these two or three directors seize upon all these 48,000 shares of additional stock authorized as we have seen by the said act, and under and by virtue of it, are now claiming in a court of equity to hold all the property which the Sussex Company had agreed to convey to the Zinc Company, and for which the latter company had paid every dollar of consideration money. Can we conceive a more gigantic fraud than is thus attempted to be practised by these two or three directors under this act of the legislature? They pocket from the Zinc Company several hundred thousand dollars, under an agreement to transfer to the Zinc Company all the stock and all the property of the Sussex Company, and they do actually pass over to them the whole 48,000 shares of the original stock of the Sussex Company, but delay transferring about thirty shares thereof for a short time for the purpose, as they imagine, of keeping the Sussex Company alive until the next session of the legislature. These two or three directors then get an act changing the name of the Sussex Company to that of the Franklinite Com-

pany. Having then no further use for the thirty shares, they then pass them over, too, to the Zinc Company at the agreed price. Then seizing upon the whole 48,000 shares of increased stock, upon an allegation that the legal title to the land owned by the old Sussex Company had not been legally transferred under the agreement of 1851 and the said act of 1852, claim to own again all the old property of the Sussex Company, and are now actually here pressing us, sitting as a court of equity, to protect them in its use.

Little could the Zinc Company imagine the innumerable woes lurking under this apparently accidental delay in transferring only thirty shares out of 48,000,—little could they dream that in the scientific alembic of Major Farrington's brain this innocent delay should work such magic results as to deprive them of all their stock represented. Before the Sussex Company got their name changed to that of the Franklinite Company, all its stock, 48,000 shares, belonged, in law and equity, to the Zinc Company. This all parties contend for and admit. This the Franklinite Company contend for as well as the Zinc Company. The Franklinite Company repudiate, equally with the Zinc Company, that the old stock of the Sussex Company, transferred as aforesaid, had any vitality after the transfer. The very corporate existence of the Franklinite Company is based upon that idea. The Franklinite Company claim to own this vein of mixed ores, not under the old stock, but under the new. I repeat that, on the 26th January, 1853, the old $600,000 of the Sussex Company's stock (if the Sussex Company had not ceased to exist by virtue of the execution of the agreement of September 4th, 1851,) belonged to the Zinc Company. But on that day the legislature changed the name of the Sussex Company to that of the Franklinite Company, and *presto* it is claimed that the property represented by this $600,000 of old stock which belonged to the Zinc Company the moment before, belonged to the Franklinite Company the moment after. Thus by a stroke of the pen, in an instant, without consideration, without even saying by your

leave, taking $600,000 out of the pockets of the Zinc Company, and putting it into the pockets of the two or three directors, who delayed a little while transferring thirty shares out of 48,000, so as to have time to accomplish it, these two or three directors sell property, and get two or three hundred thousand dollars cash value in hand for it—thus changing their name, and it is all back again. This beats anything in the Arabian tales. It obscures the Alchemist—no such pocket as this was ever discovered in California. It was the easiest way of making $600,000 I have ever heard of. It was not to be expected that so successful a financial achievement should rest satisfied with one operation. It was a lead too promising not to follow; accordingly we find that the new Franklinite Company soon had a very numerous progeny. These companies immediately and rapidly increased, branching off from each other like gamblers at *vingt-une*. The pamphlet laws of those years are plethoric with their charters, and in which these same two or three directors are the *dii majores*. Mr. Fowler says that he alone had stock in no less than fifteen of them, and he don't know how many more, *viz.* the Passaic Company, the Fowler Franklinite Company, the Union Exploring Company, the Franklinite Steel Company, the National Paint Company, the Sparta Iron Company, the Consolidated Franklinite Company, the Triunion Company, the New York Franklinite Company, and we hear of others through this large volume of testimony, none of them having less than $600,000 of capital stock, and most of them over a million. What oceans of money they made no one can tell. All this while this Zinc Company pursued its plodding way, building oven after oven, furnace after furnace, and factory after factory, expending in such improvements, upon the faith of this transfer of stock, over $300,000, besides the very large consideration money it had paid, forcing success along the hard road of industry, developing, according to the true intent of its charter, the ore of zinc, manufacturing that pure snow-white paint for the calls of commerce and comfort, convenience and elegance of life.

They were the workers in the hive—they were the silk-worms painfully weaving their shrouds of silken thread, while this Franklinite Company toils not, neither does it spin—not an ounce of its boasted franklinite has it ever yet yielded to the demands of commerce. It springs at once into the butterfly stage of its existence, whose only object in life is to spread its golden wings to the glittering sunshine and multiply its worthless species. I conclude that this act of the legislature, changing the name of the Sussex Company to that of the Franklinite Company, and adding another $600,000 to its stock, however it may continue down to the Franklinite Company any scintilla of legal title remaining in the old Sussex Company, cannot alter the condition of the questions of equitable right—that the broad fact still remains, that before this act was passed the Sussex Company had agreed to sell the vein in question to the Zinc Company, had received the whole consideration money, had transferred to the vendee all its stock and put him in possession, and if it had not transferred all its legal title, it ought so to have done, and equity will treat it as if it had.

Nor can the Franklinite Company claim any rights, legal or equitable, in the old property of the Sussex Company by virtue of the increased stock. The Franklinite Company must say, either that they are the old Sussex corporation or a new corporation. If they are a new corporation, then they can have no rights whatever in the old stock or the property of the old company—they are neither its devisee or its heir. But suppose the Franklinite Company are, as they claim to be, the old Sussex corporation under a new name, there are some legal consequences which I apprehend the Franklinite Company have not entirely digested.

If the Franklinite corporation is the old one under a new name, who are its stockholders—and of the increased stock, as well as the old, how did the individuals who have been pretending to deal in it get it? Before the name was changed or stock increased all the stock of the corporation belonged to the Zinc Company or its stockholders. To whom did the increased

stock belong? Clearly to those who owned the old stock by virtue of their old stock. It follows, as a consequence, that at this day the Zinc Company owns every dollar of the stock of the Franklinite Company, and are as such entitled, in equity, not only to all the real and personal estate still belonging in law or equity to the old Sussex Company, but also to all the property of the Franklinite Company since acquired, from whatever source, upon the principle, that the owners of the stock of a corporation are, in equity, the owners of all its property. And if we have only the Sussex Company by a new name before us, under the agreement of 1851, and the transfer of all its stock, the Zinc Company, in equity, own not only this vein, but all the other property now claimed by the Franklinite Company, and that whether it gets title under the Fowler deed of 1848 or under the Curtis deed of 1850 and 1853, or however otherwise. It is not the Franklinite Company who will own in equity the old property by virtue of its new stock, but the Zinc Company now will own the new property by virtue of the old stock.

I conclude that not only does the Franklinite Company fail to prove any right in equity to the use of this vein, but that the proof shows affirmatively that it is in the Zinc Company, and that such right ought to be protected in equity, even if there is a legal title in the Franklinite Company.

But does the proof show any such legal title? This we will now proceed to examine. The Franklinite Company, in claiming title to this vein of ores through the Fowler deed of 1848, can only do it as being the old Sussex Company under a new name. If they are a new corporation as to this property in dispute, they clearly show no legal title to it. They show no deed, no consideration paid, no agreement to transfer. They only show the act changing the name, and as such cannot be either the heir or devisee of the Sussex Company. That the Franklinite Company, as to this vein of ores, is a new corporation, and not the old Sussex corporation under a new name, has been substantially already adjudicated at the solicitation of both parties.

After the act creating the Franklinite Company in 1853, the Franklinite Company waited formally upon the Zinc Company, and demanded of them the old charter; the Zinc Company demurred, and it was finally left to Judge Kent, who decided that the Zinc Company had no claim on the charter, and in consequence thereof, on the 25th of October, 1853, the Zinc Company resolved as follows: "that the Zinc Company acknowledges that it has no claim of any kind or description on the charter of the New Jersey Franklinite Company or to any of the privileges thereby conferred, and that the president of this company is hereby authorized to furnish a certified copy of this resolution to the president of the Franklinite Company." It is perfectly apparent upon what grounds Judge Kent must have proceeded; for if he had not thought that the Franklinite Company, as to the old property of the Sussex Company, was a new corporation, the Zinc Company, instead of having no claim on the charter of the old Sussex Company, would be the only party that had. But if the Franklinite Company, as to the old property, was a new corporation, then as clearly they had not. Judge Kent must therefore have looked upon the action of the legislature of 1853 as creating a new corporation in rather a novel way, whose directors and powers were defined by the original Sussex charter, and that therefore the Franklinite Company had an interest in the old charter, and that the Zinc Company had not. And the same is implied by the language of the resolution, which disclaims, on the part of the Zinc Company, all interest not in the Sussex charter, but in the charter of the New Jersey Franklinite Company.

I am of opinion that the Franklinite corporation, as regards the Zinc Company and the old property and stock of the Sussex Company, are a new corporation, and have no legal title, and have and hold none of the legal rights of property that belonged to the Sussex Company. The Franklinite Company have in every respect acted like a new corporation. They treated the increased stock as the stock of a new corporation; they bought other lands, and went into

business as a new corporation under its new stock—not a single share of the old stock has ever been represented in any of its proceedings or voted upon for any of its officers. The only solitary act in ten years that the Franklinite Company has done, otherwise than as a new corporation, is this claim to own the old property under its new stock. The Zinc Company, having been put in possession by the old Sussex Company, and the Franklinite Company showing no legal title, surely have no right at law or in equity to disturb the Zinc Company in the use of the property in dispute.

But there is still another difficulty in the legal title of the Franklinite Company to this vein of ores. On the 8th of March, 1852, a year before this Franklinite Company was formed, the Sussex Company made to the Zinc Company a deed, in which the property intended to be conveyed is described as follows: do grant, &c., "all the zinc and other ores, except franklinite and iron ores found or to be found in, on, or upon the following described premises, that is to say, that certain farm, situate in the township of Hardyston, Sussex, New Jersey, consisting of several contiguous tracts: first, the Mine-hill farm, consisting of 93.16 acres, butted and bounded as follows: beginning," &c., and describing it by metes and bounds; and after doing so, proceeds in the following words: "together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the above described premises, and every part and parcel thereof, with the appurtenances, to have and to hold," &c. There may be, perhaps, in this description one latent and two patent ambiguities. The first patent ambiguity may be caused by the words "all the zinc and other ores, except franklinite." Are we to read this as if the language were, all the zinc except the franklinite, or as if it were all the

other ores except the franklinite. My opinion is that the latter is the true construction, and that the franklinite is to be excepted from the other ores, and not from the zinc, that the zinc ores are to be conveyed and all the other ores except franklinite and iron ores.

The other patent ambiguity originates in the words, "and also all the estate, &c., of the parties, &c., of, in, and to the above described premises." Do the words, "above described premises" refer to the words in the first of the description, all the zinc and other ores, or to the premises described by metes and bounds? I am of the opinion that they refer to the latter. We are not inquiring as to the effect of these words if they had been inserted in the *habendum* clause, but as to what is their legal effect when used as words describing the property conveyed. The language used here has precisely the same legal effect as if the description had read, "all the zinc and other ores found in, also all the estate of the parties of the first part of, in, and to the following described premises, that is to say," &c., and then describing it by metes and bounds. The deed, upon the face of it, was evidently intended to convey not only the zinc ores, but also all the estate the grantors had in the premises described—clearly as much so as if the deed had omitted the words zinc ores, and had merely said, we convey all our right and title to the premises, butted and bounded as follows.

The result of this conclusion is, that as both parties have claims under the Sussex Company, and so admit that the Sussex Company owned this vein of ores in dispute, I say the result is, that this vein in dispute passed by the very terms of this deed to the Zinc Company. It has been argued that this construction would destroy the exception. I do not see how. The exception would have been there quite as appropriately if the grantors did not claim to own the franklinite at all, and which, by the way, the case shows they did not claim to own, for they bought it afterwards of James L. Curtis and his brother. It is also argued that this construction would operate to pass the absolute fee in the land itself. But not so

if they did not own it, and that they did not pretend to; and if they did, and used that language, it ought to pass, unless they alleged some mistake or misapprehension, which is not pretended. It is also argued that these terms, if used in the *habendum* clause, are limited to mean the thing granted. This is admitted. But it so happens that these terms here are *not* in the *habendum* clause, but in the clauses describing the property conveyed, and by the terms of the deed this right and estate of the grantors is as much the thing granted as the ores themselves. The things granted here are the ores and the grantor's estate in the premises described by metes and bounds. The words are not used to alter or enlarge the extent of the grant, but it is the very thing itself granted.

If we are right in this construction of the deed, it is very evident that the Franklinite Company have not a scintilla of legal or equitable rights.

But as the decree below proceeds upon the finding that the evidence shows that at the execution of the deed the parties thereto understood that this vein in question was not a zinc, but a franklinite ore, and so excepted from the deed; and as that question was very forcibly and earnestly argued at the hearing, we will proceed to examine that question more at large.

The Zinc Company contend that, by the term zinc ores in this deed, both parties intended this vein of ores. The Franklinite Company contend that they did not; that this vein is not a zinc, but a franklinite ore, and so was intended to be excepted. This is a latent ambiguity, and only to be solved by the evidence, and the object of the evidence is to ascertain the meaning attached by the parties to the words used at the time of the execution of the deed. But how are we to ascertain this meaning?

The most certain way of fixing the meaning of the terms of description used in a deed was the old common law practice of livery of seizin. In this case, if the parties had gone upon the mass of ore in *situ* and made livery, by whatever name they might have called it, the identical mass of ore would

have passed. The parties would have demonstrated on the ground what thing they meant by the term "zinc ores," as if a man takes a horse by the bridle, and says, I sell you this cow, and delivers the article, the horse would pass. But when the conveyance is by deed of bargain and sale, and the thing sold is only designated by arbitrary signs, the only way to ascertain the mind of the parties is to attach the sign to the thing sold in the best way possible; and when there is any doubt what thing the sign stands for, it is necessarily a matter of proof, and the thing to determine is the weight of the evidence.

What, then, was meant by the parties at the time they used the term zinc ores in this deed? Did they mean this vein in dispute? The Zinc Company say they did—the Franklinite Company say they did not. They say that this vein was not a zinc ore at all, but a franklinite ore and not a zinc ore, and that instead of intending to convey this as a zinc ore, they intended to except it as a franklinite ore. In ascertaining this intent, I shall first call attention to the condition of the property at the time of the execution of the deed.

The evidence establishes beyond dispute that if this vein in dispute is not a zinc ore there is no zinc ore on the property at all, and that both parties must have perfectly well known at the execution of the deed. It is also perfectly well established, by the evidence, that if this vein is not a zinc ore, that there are no ores on the property but iron ores, including this franklinite, a species of iron ore, and which all parties also perfectly well knew. The evidence also shows that this vein had been known and worked for a century as an ore yielding a large per centage of metallic zinc, and from which the zinc for the United States standard weights and measures was obtained.

The evidence also shows that there were no other ores on the premises except this vein of franklinite and iron ores, and all parties well knew it. Now, may we not ask, if it was not the intention to convey this vein by the name of a zinc

ore, what did the parties intend to convey? It is apparent, that if they did not intend to convey this vein by the name of a zinc ore, it must have been the intent of both parties to convey nothing. I think these facts show that it must have been the intent to convey this vein by the name of a zinc ore, for there is nothing else upon which the deed could operate, and both parties must have known it. There is nothing upon this property but this vein of franklinite and iron ore. The franklinite and iron ores are excepted in terms, and if this vein was meant to be excepted as franklinite the deed conveys nothing, as both parties must have known. Under these circumstances, we can draw no other conclusion than that the parties meant to convey something by the deed, and that could only, as both parties must have known, have been the vein in question. That the parties must have intended to convey this vein as a zinc ore, and not make a deed that conveyed nothing, is further proved by the consideration given. The Zinc Company had a capital of $600,000, divided into 48,000 shares, and which were then selling at about par. This capital stock was then doubled, and they gave the whole of their increased capital for this deed. Now are we to believe that the Zinc Company would give, and the Franklinite Company take 48,000 shares of the Zinc Company stock for a deed which both parties must have known conveyed nothing? We can only conceive this upon the supposition that both parties thought that this vein was passed by the deed under the name of zinc.

But again: it is manifest, from the evidence, that the vein of ores was owned by the grantor, and that it was the only thing he did own in the premises. As the grantor got this large consideration, must it not have been the intent to convey the thing he owned? Can we believe he intended to convey something he did not own? Must it not, therefore, have been the intent of the parties to convey this vein under the name of zinc? Another evidence that this vein was intended by the parties to pass under the name of zinc, is that

in all other deeds, ancient and modern, this vein has been passed and repassed, reserved and re-reserved, under the name of a zinc ore, and this deed now in controversy is the first one where it was ever pretended that it did not pass by that name. Thus, in the deed from Doct. Fowler and his assignees, the deed conveys all the zinc and iron ores in Mine-hill. Now, in all the ancient deeds, of what material thing was the word zinc a sign? There is no such word as franklinite in any of them until this deed of Fowler in 1848. In all the ancient deeds, does not the word zinc stand as a sign for this vein in dispute? It will be remembered that Farrington, the main witness for the Franklinite Company, says: "There are the remains of several old pits along the line of the vein, some of which look as though they might have been made one hundred years ago." Now, where we find the ancient as well as the modern deeds conveying the zinc and iron ores, is it not apparent that by the zinc ores they mean this vein? How does it happen that, if this vein had ever been known not as a zinc vein, but only as a franklinite ore, it is never so called in any deed, ancient or modern? If there was no zinc in the Mine-hill, how does it happen that the deeds are always professing to convey all the zinc ores, and say nothing about franklinite? On the 15th February, 1845, Oaks Ames made a deed to Cyrus Alger, under whom Samuel Fowler held, as follows: "in consideration of $2500, I bargain and sell to Cyrus Alger the one undivided half part of all the zinc and other ores and minerals on or within any of the lands owned by Samuel Fowler, excepting iron ores when unencumbered with zinc and other metals." The Franklinite Company claim the vein in question under this deed, and yet the word franklinite is not in the deed. Now, as this vein was the only one of value except iron ore uncombined with zinc, it is passing strange that if this vein was then known as a franklinite, and not as a zinc vein, the only thing that was intended to be conveyed was not even named, while all the terms employed relate to zinc ores, of which, if this vein was not intended to be passed as zinc ore, both

parties knew there was not a particle on the property. This deed proves that up to 1845, no one, in dealing with this vein as an article of sale or purchase, ever thought of calling it a franklinite ore, for the very obvious reason, that this franklinite mineral was entirely worthless. The vein was only valuable for the zinc that was in it.

Let us now examine this deed of 1848, and see if Fowler himself does not, in this very deed, convey this vein to the Sussex Company under the name of zinc, and not under the name of franklinite. Chancery has found that this deed did convey this vein, and I entirely agree both with its reasoning and its result. The language of this deed is "do bargain," &c., "all the zinc, copper, lead, silver, and gold ores, and also all other metals and ores containing metals (except the metal or ore called franklinite and iron ores, where it exists separate from the zinc) existing, found, or to be found on that certain farm," &c. This vein passed, if it passed at all, by the force of the words of grant, and not by the force of the words of exception. With respect to this deed, the Franklinite Company take contradictory positions. They first contend that this deed of 1848 does not convey this vein to the Sussex Company at all, and in the second place they contend that it did pass it, but that it never has been passed by deed from the Sussex Company to the Zinc Company, but still remains in the Franklinite Company, as being the old Sussex Company under another name. I shall first consider the position taken by the Franklinite Company, that this vein did not pass at all by this deed of 1848 from Fowler to the Sussex Company. Upon this point the Franklinite Company contend that, as regards the words "except the metal or ore called franklinite and iron ores, where it exists separate from the zinc, that the words "where it exists separate from the zinc" apply only to the words "iron ores," and not to the word "franklinite," and that the vein in question is a franklinite ore, and not a zinc ore, and that the vein is consequently excepted from the grant under the name of franklinite. But the evidence clearly shows that at the date of

this deed all parties perfectly well knew that the only ores or metals in this Mine-hill were zinc, franklinite, and iron ores, and that if this vein was not a zinc vein of ores there was no zinc on the premises; and as the franklinite and iron ores are excepted in terms, it follows, under this construction, that the deed conveyed nothing. The deed shows that the Sussex Company gave 20,000 shares of stock, which at its par value was $250,000, for this deed. It is therefore utterly impossible to believe that the Sussex Company could give this large price for a deed which they must have known conveyed nothing. The only possible way to explain it is, that this vein was regarded on all hands as a zinc vein, and passed under the deed by the name of zinc.

Taking the franklinite construction of the deed as the true one, it leaves in this deed of 1848 the same latent ambiguity as in the one of 1852, *viz.* what is meant by the term zinc ores in the words of grant, and by which the evidence shows the parties must have intended this vein of ores. But the latent ambiguity in the deed of 1848 is cleared up by further description. By the true construction of the deed of 1848, the words, "when it exists separate from the zinc," applies to the franklinite, it only excepts franklinite which exists separate from zinc, and of course conveys franklinite when it is not separate from the zinc, and as the proof shows this vein is here mixed mechanically with franklinite, it all passes. That this deed of 1848 passes this vein with the franklinite mixed with it is manifest from many considerations. In the first place, it is the true legal construction of the language of description. This is, "all the zinc and other ores, except the metal or ore called franklinite and iron ores, where it exists separate from the zinc." This is the first deed in which the word franklinite was ever used. In all previous deeds this franklinite had always been conveyed under the name either of zinc or an iron ore. Franklinite was not properly either a metal or an ore; it was zinc and iron in chemical combination, and thus could no more be an ore of franklinite than there could be an ore of brass.

The draftsman of this deed of 1848, when he came to make this exception, was in doubt what precise terms to use; he was in doubt which precise effect would be given to the term franklinite, as it never before had been used in any deed. It had always before, when existing separate from zinc, and when not regarded merely as a dross mixed with the zinc, been regarded as an iron ore, and is so treated and claimed by the Franklinite Company in all their proceedings. He therefore, in this exception, calls it by both names, *viz.* "excepting the ore or metal called franklinite and iron ores," having the word "called" understood before the word "iron" as well as before the word "franklinite," inadvertently using the plural of ore, by reason of its immediately following the two words, "franklinite and iron." There was only one thing meant to be excepted, and that was the thing called both franklinite and iron ore, and that only when it existed separate from the zinc. If it had been intended to except two things, *viz.* a thing that was called franklinite and a different thing that was called iron ore, the language would not be what it is, but it would naturally have been as follows, *viz.* excepting the metal or ore called franklinite, and also excepting the iron ores when they exist separate from the zinc. This is further manifest from the word "it" following the word "iron ores." We can only account for the use of the word "it" in that connection by the supposition that the writer intended to except one thing, *viz.* something that was called indifferently franklinite or iron ore. If it had been intended to apply the words, when separate from zinc and iron ores, the language would have been when "they," (not "it,") exist separate from the zinc. But suppose we change the word "it" into "they" the construction would still be the same. The language of the deed would be, except all the ores called franklinite and iron ores where they exist separate from the zinc. But that it was intended by the parties to except the franklinite where it exists separate from the zinc is perfectly manifest from the *habendum* clause. This is as follows: "to have and to hold all and every the zinc,

&c., and other metals and ores, excepting the one called franklinite, when it exists in a separate and distinct state from the zinc."

I do not see what possible ambiguity can remain in the exception in the words of grant after reading the exception as defined and emphasized in the *habendum;* and as the proof amply shows that what franklinite there is in the vein is not separate from zinc, but, on the contrary, so intimately mixed mechanically with the zinc as that it cannot be separated from it, it cannot be that the parties did not intend to convey this vein under the name of either of zinc or "other ores or metals." But I go further—not only does the deed of 1848 convey this vein by its terms, but it conveys it by the name of zinc ore. As what passes must be of grant, and not by force of the words of exception, the vein must pass either by force of the words "all zinc ores" or by force of the words "all other ores." The Franklinite Company contend that this vein was called a franklinite vein, and that it passes therefore under the words "other ores," which would comprehend franklinite. The exception shows that it was not intended to convey all the franklinite, but only the franklinite ores mixed with the zinc ores. Taking the words of grant and of exception together, it is the same in legal effect as if it had read, we sell, &c., all the zinc ore and all the franklinite ore mixed with the zinc ore. Now the vein would not pass simply by the words franklinite ore mixed or not separated from the zinc ore. That would only pass the franklinite portion of it, leaving the title to the zinc part of the ore in Fowler. The zinc part of the vein must necessarily, therefore, have passed by force of the words, "all the zinc ore;" so that it must have been the intent of the parties in this deed of 1848 to have conveyed at least the zinc portion of this vein under the name of zinc ore, and not under the name of a franklinite ore.

Again: the whole object of this deed of 1848 was to convey this vein. It was the only thing Fowler owned in the premises, and was the only thing there of any value. If the vein had

been understood and called by the parties a franklinite, and not a zinc ore, how did it happen that the term franklinite is not used in the words of grant? The deed uses the words, all the zinc, copper, silver, and gold ores—of which the defendants say there was none, not even zinc, and the only thing they say was there, *viz.* franklinite ore, is not in the words of the grant at all. We can only answer for this upon the supposition that at the time all parties understood this vein to be a vein of zinc ore, and that the worthless franklinite passed with it as its dross, and the object of the exception was to prevent franklinite, when separate and distinct from the zinc ore, from passing under the name of other ores.

But again: by whatever name this vein may have gone by among men of science, it was not conveyed in this deed of 1848, nor had it ever before been conveyed by any deed, ancient or modern, under the name of franklinite. But there are many other considerations, considering the words zinc and franklinite as latent ambiguities, which go to show that this vein was intended to be conveyed in this deed of 1848 under the name of zinc ore. Major Farrington, the main witness of the Franklinite Company, and who, by his interference with the deed of 1852, made this whole controversy, says "the Sussex Company was an organization under a charter formed for the purpose of manufacturing zinc from ores obtained in Sussex county. They purchased zinc ores upon Mine-hill." Now, as there is no pretence that they ever acquired any zinc ore except this vein, they must have got it by virtue of this deed of 1848, under the term zinc ore, in that deed. Again, the very title of the act of this Sussex Company was the Sussex Zinc Mining and Manufacturing Company. They wanted zinc, not franklinite ore,—nay more, as soon as they got this deed they went immediately into possession and at work upon this vein as a zinc ore, mined several hundred tons, but did not pursue it long, not because there was not plenty of zinc ore in it, but because it was not in the form of a red oxide. So that it is perfectly manifest that in this very deed of 1848, under which all these parties claim this

vein, was bought and sold, in consideration of $25,000, under the name of a zinc, and not a franklinite ore.

But there is another curious cotemporary fact showing that this deed of 1848 conveyed this vein under the name of zinc. At the same time that Fowler made this deed we have spoken of he made another deed, without any consideration, to the Sussex Company for all the franklinite specially by name, on a portion of the very premises described in said deed of 1848. The language of this last deed is, "all the metal, mineral, or iron ore usually known and designated by the name of franklinite, found or to be found on, upon, or in a certain tract of land," going on and describing a part of the very premises described in the deed conveying the zinc ore. Samuel Fowler, one of the other main witnesses for the Franklinite Company, being asked, "after you conveyed the zinc and other ores to the Sussex Company by the deed of the 10th March, 1848, did you make a separate conveyance to that company of franklinite," answers, "after I agreed to convey the zinc ore to the company, I agreed to convey, and did convey, in March, 1848, the franklinite ore on a piece of the land on Mine-hill farm;" so that, by the testimony of the very man who made this deed under whom all parties claim, says that he made the first deed to convey zinc ore, and the later deed to convey franklinite ore—must he not therefore have intended to convey, and did he not actually convey this vein in the first deed by the name of zinc? Why, if the parties then had regarded this vein as franklinite, and not zinc, what was the object of making the second deed? They got all the franklinite by the first deed. By the theory of the defence, this vein is franklinite, and not zinc, and the second deed had nothing to operate on. These facts conclusively show that the object of Fowler's first deed was to convey to the Sussex Company this vein under the name of zinc ore, and to convey by the second deed franklinite not so mixed with zinc as to pass under the name of zinc ore. But not only is this vein passed as a zinc ore in this deed of 1848, but again it so passed to Fowler in the deed from Alger in 1849. But not only so,

it is so conveyed and confirmed again in Fowler's deed of confirmation in 1849. But again, not only do all the ancient and modern deeds show that this vein was called a zinc ore, and not a franklinite ore, but all the previous charters obtained from the legislature look the same way. All these charters, and there were several of them, up to 1853, recognise this vein as a zinc ore, and it was not until the Sussex Company had conveyed to the Zinc Company, for the large consideration we have named, all their zinc property, that these ingenious gentlemen, who got up all these recent charters, bethought themselves that by playing upon this word franklinite, by substituting for the name which the vein had gone by when spoken of as a subject of bargain and sale, the name by what men of science had originally designated this species of this mineral franklinite, they could start through the air all these beautiful and variegated bubbles, the success of their ascent being in proportion to their nothingness.

What right have we, then, when we find that in all the ancient and modern deeds, in all the old charters, this vein is conveyed by the name of zinc, to say that in this deed of 1852 it was not also conveyed to the Zinc Company under the same name? But these by no means exhaust the evidence that it was the intent of the parties to convey, by this deed of 1852, to the Zinc Company this vein of ores under the name of zinc. All parties connected with these transactions, the complainants as well as the defendants, the vendors as well as the purchasers, the mortgagees as well as the mortgagors and encumbrancers, in all the deeds they have made, in all the agreements they have entered into, in all the sales they have made, in every bushel of ore they have dug, in every pound of zinc they have extracted, in every certificate of stock they have issued, in all their acts of every description they have done from the granting of the charter of 1848, have always dealt with and treated this vein as a mass of zinc ore in *situ*. The Sussex Company was chartered to manufacture zinc, not iron —its chartered name was a Zinc Company—it sought to buy,

by the deed of 1848, a mass of zinc ore in *situ* for its chartered purposes. Under the deed, they took immediate possession of the vein with the full knowledge and consent of the vendor, and commenced to extract the ore as a zinc ore, and continued so to do until they discovered that the red oxide of zinc on Stirling-hill could be, in the then condition of the manufacture, somewhat more economically worked. They issued over $300,000 of stock, under the representation that they owned this vein as a mass of zinc ore in *situ*. Let us particularize some of these acts. Thus, on the agreement of 4th September, 1851, it was agreed between the Sussex Company and the Zinc Company that they would both apply to the legislature to obtain an act authorizing the Sussex Company to transfer all their property to the Zinc Company; and in pursuance of that agreement, both parties did so apply, and represented to the legislature that the Sussex Company, the owner of certain zinc mines in Sussex, and it is so recited in the preamble to the act. Yet the only property the Sussex Company owned was what they bought from Fowler in the deed of 1848, the only zinc on the premises was this vein, as all parties perfectly well knew. In this application to the legislature, upon which that act was founded, and which act is the foundation of all proceedings since, this very Franklinite Company must have represented to the legislature that this vein was a zinc, and not a franklinite vein, and procured the passage of the act upon that very representation. Again, in the answer of the Franklinite Company, they say that the intention of this deed of 1852 was to enable the Zinc Company "to develop the metals of zinc ores." Now how could that be the object, unless it was the intention, by the deed of 1852, to convey this vein, for that was all and the only zinc property they owned. Again, the Franklinite Company say, in their answer, that after said deed of 1852, they bought of Fowler the franklinite ores, or a portion of Mine-hill, to develop the metals of the franklinite ore; so that, if we can believe their own answer, they must have intended to pass this vein under the deed of 1852 under the

name of zinc, thus could not have intended to retain this vein under the exception of franklinite, for they expressly state, in their answer, that they afterwards bought that from Fowler, and their answer, so far as it states otherwise, contradicts itself.

But again: if there is anything that stands out in bold relief in this cause, it is that it was the intention of the deed of 1852 to convey to the Zinc Company *all* the property of the Sussex Company. This is proved by the agreement of 1851, by the act of the legislature of 1852, by the evidence of all the witnesses on both sides, by the actual transfer of all the stock of the Sussex Company, both that held by individuals and that by the corporation, and by the universal admission at this day, that every share of that stock is now rightly held by the Zinc Company. If this be so, it could not be otherwise than that the deed of 1852 passed, and was intended to pass this vein under the name of zinc, the only possible escape for the Franklinite Company is to say that they themselves got no title for the vein by the deed of 1848 from Fowler.

But we have already shown that this vein did pass to them under that deed. Thus we might go on, if time permitted, that always, in every possible way and from the parties to the deed of 1852, acted, spoke, and treated this vein as passing by this said deed under the name of zinc ore. But it is said, in behalf of the Franklinite Company, that the deed of 1852 differs from the deed of 1848 in this, that the deed of 1848 conveys "all the zinc and other ores, except franklinite ore, when it exists separate from the zinc," and the deed of 1852 leaves out the words "where it exists separate from the zinc;" and it is therein argued that the deed of 1848 conveys the vein under the words other ores, and the deed of 1852 excepts it under the name of franklinite. This should be very manifest before the court should so hold; for if that be so, as this vein was all the property the Sussex Company owned, the deed of 1852 conveyed nothing, and both parties must have known it. The construction of the deed should be most

strongly against the grantor. And we have shown that the intent not to convey this vein could not consist with the avowed intent of the deed of 1852 to convey *all* the property of the Sussex Company.

But independently of all the considerations I have named, let us see what this suggestion amounts to. The Franklinite Company must satisfy us, first, that when the deed of 1852 was executed, that the parties thereto understood that this vein was not a zinc ore, but a franklinite ore, and intended to except it under the latter name. But this they are estopped from doing by the avowed object of the deed and the proof of all the witnesses that it was the intent to convey all their property.

But we are asked, if the change in the deed of 1852 had not the object to reserve the vein under the name of franklinite, what was its object. We answer, in the first place, that is not the business of the Zinc Company; they are grantees, and it is for the other side to manifest their exception. But if it was the duty of the Zinc Company, it is entirely explained by the evidence of the main witness of the Franklinite Company, Major Farrington. This witness says all things went on according to the agreement of 1851; the act was procured, the stock all passed over, the deed drawn to convey all the property to the Zinc Company; and he and all the other witnesses expressly swear that the agreement of 1851 was carried out. He then explains how this alteration in the language of the description of the deed in 1852 happened. He and all the witnesses say it was not to convey less than the whole property, but he states here how it happened. He says the deed was first drawn in the precise language of the deed of 1848. Both boards of directors met, all parties were satisfied with it, and they were about to execute it when he suggested a scientific doubt. Franklinite is a mineral which is composed of zinc and iron in chemical combination, and Farrington suggested that, as franklinite, in *rerum natura*, could not exist chemically separate from zinc, that therefore the phrase in the deed of 1848, "except franklinite

where it exists separate from zinc," would embrace franklinite mechanically separate from zinc; and the deed was altered not to prevent the passing of all the property of the Sussex Company, but to prevent its being construed to pass franklinite when not mechanically mixed with zinc and when zinc was only present as a chemical constituent of franklinite. The deed was altered with that view, and out of this absurd scientific doubt has sprung this controversy. The Zinc Company yielded to the major's scientific doubt, and that clause was stricken out. But there was another clause inscribed in the deed much more significant than the clause stricken out. Major Farrington tells us that the deed of 1852, first drawn, was a verbatim copy of that of 1848, and a new deed was drawn, which was finally executed, and is the deed of 1852 before us. Neither the deed of 1848 or any of the previous deeds contained any such description in it as the one in this deed of 1852, conveying "all the right, title, and estate of the Sussex Company in the premises described." Now, in the second deed, as drawn, Major Farrington has told us why the words "separate from the zinc" are stricken out, but he has not told us why the words "all the right, title, and estate," &c., were put in. The reason is perfectly manifest from the case. The words were stricken out to prevent the consequence, as suggested by Farrington, of conveying franklinite when separated mechanically from zinc, and the words "all the estate, right," &c., inserted to prevent any inference from the striking out the words "separate from the zinc," that the parties intended to convey less than their whole property. To the question, therefore, why the first clause was stricken out of the deed of 1852, we answer by asking why the second clause was put in. Again, what possible inference can we draw from the fact, that all the stock of the Sussex Company was conveyed to the Zinc Company, and that it is to this day admitted by all parties so rightly held, than that this property was intended to be conveyed by this deed of 1852 by the name of zinc. But it is urged that the evidence shows that, at the date of the deeds, and as late as

1853, the mass or veins of ore in Mine-hill were regarded and known as franklinite; that the ore was so classified and arranged in mineral cabinets and exhibitions; that it was described in scientific treatises, in geological reports, and was so called by the proprietors of the mines and by the miners themselves. But what do all these amount to if it appears by the overwhelming weight of other considerations, some of which we have indicated, that the parties to the deed, at the very time of execution, intended to convey the vein in question by the name of zinc?

But further: when a mineralogist was arranging his cabinet, if he came across a specimen of franklinite from this vein, he would of course classify and arrange it as franklinite, and not as something else, and when he came across a specimen of that portion of the vein which was zinc ore, would he not also arrange and classify that as zinc ore; and would either have the slightest tendency to prove what the owners of the whole vein would call it when they were applied to to sell it by a company chartered for the sole purpose of manufacturing zinc from the ore? So as to its being described as franklinite ore in scientific treatises and geological reports, when treating of franklinite, they would treat this vein as a franklinite vein, and when treating of zinc, they would treat it as a zinc vein, and no inference from either could be justly drawn as to what these parties in these deeds meant to pass by the name of zinc.

But it is further said, that at the dates of these deeds, and up to 1853, this vein was called franklinite by the proprietors of the mines and the miners themselves. It is very true that since 1853, when this controversy was first stirred, and when the Franklinite Company first conceived the pleasant financial operations which might be made by a play upon this word franklinite, the directors and agents of the Franklinite Company have made it a matter of business to call this vein franklinite; but I can find no evidence at all satisfactory that before that time the vein, as a mass, was called franklinite by anybody.

As a specimen of what reliance can be placed upon this kind of testimony, let us take the evidence of Oakes Ames, perhaps the most candid of all the witnesses of the Franklinite Company, and the one most likely to know. He says that he first became acquainted with Mine-hill in 1826; that the bed of ore was then called franklinite. They formed a company about that time, called the Franklinite Manufacturing Company I think, leaving us to infer that, so early as 1826, this vein was so well known as franklinite that a charter was created for the express purpose of manufacturing the franklinite in it. Yet the truth is, that the charter he must have referred to, instead of being called the Franklinite Manufacturing Company, was called in its charter the Frank*lin* Manufacturing Company, and only so called because it was located near the Franklin furnace, and its object, as declared in its charter, was to manufacture not franklinite but zinc. So that at that time this vein must have been known as zinc ore, even according to the evidence of Mr. Ames. But if this vein was called a franklinite ore, and not zinc, when this deed of 1852 was made, when did it begin to be called so? It certainly could not have been prior to 1821, because before that time the word franklinite had not yet been invented. Doct. Fowler was a learned mineralogist, and finding in this vein a substance different from any other in his cabinet, sent specimens to his correspondents in Europe and America, among others Berthier, a chemist in Paris. He, in 1821, resolved it into its elements, and discovered that it was a new mineral species, and christened it by the name of franklinite, because it had first been found at Franklin furnace, in Sussex county, New Jersey. Now this vein had been known for sixty years before that, and known as yielding a very large per cent. of metallic zinc, and zinc had been known as valuable in commerce from very early times. The vein had been worked for its zinc for sixty years. It is apparent, therefore, that long before 1821 this vein must have had a name, and that name not franklinite, but zinc. It is altogether likely, that after it was thus dis-

covered, that this was a new mineral species, and that this was the only place in the world where it had ever been found. That both Doct. Fowler and this learned correspondent talked a good deal about it, and that the old acquaintance, zinc, was for some time, as is customary in such cases, overslaughed in the halls of the learned by this new-born babe of science. But in their learned descriptions they had no idea or object to discuss or settle the question whether, when Doct. Fowler came to sell this vein to purchasers, he shall change the name of the mass of ore in *situ*, and call it, for commercial purposes, either a zinc ore or a franklinite vein. Though after this discovery, in 1821, this franklinite was to some extent a scientific toy, we can hardly suppose that Doct. Fowler or any other owner would, when he came to seek a purchaser, change the name of this vein from zinc to franklinite. Zinc had been known as valuable in commerce as long as brass had been manufactured. But this franklinite was the most useless iron ore that had been discovered. There it had laid for an hundred years within 300 yards of an iron furnace, tortured in every shape that skill and avarice could put upon it to declare its hoped-for usefulness, and the only thing ever successfully generated between it and the furnace was a *salamander*. The Franklinite Company now in this case ingeniously account for this by swearing that they suspect that its good qualities are not yet fully developed. The evidence fully shows that neither Doct. Fowler or any other owner, when he wished to sell this vein, ever libelled his own property by calling it franklinite. It was never, in any matter of sale, pretended to be called franklinite until this Franklinite Company, in 1853, having sold it as a zinc vein, in order to give this Zinc Company, as their evidence declares, the monopoly of zinc ores in Sussex, sought, by calling it a franklinite ore, to get at the zinc, and put the profits arising from the zinc in their own pockets. Can there be any better evidence that all parties consider and treat this vein as a zinc ore than the avowed and proved acts of the Franklinite Company in this very case?

They pretend that this vein is franklinite, and not zinc; that their sole object is not to manufacture zinc, but to manufacture iron from the franklinite, and yet the first thing they do is to erect not furnaces to manufacture iron, but ovens to extract the zinc. They manufacture nothing but zinc, put it in the market to compete with the Zinc Company, when their avowed object in this deed of 1852 was to give the Zinc Company a monopoly of the zinc manufacturing, and then treat all the ore but the zinc ore as a useless dross. They profess to want only the iron, but they use only the zinc. The evidence, to my mind, that the deed of 1852 was intended by the parties to pass this vein by the name of zinc, is as strong as if the parties had gone upon the mass of ore in *situ*, and had made livery of seizin thereof with all the forms and solemnities of the common law.

As it appears, from what we have said in discussing the effect of this deed of 1848, that this vein of ores passed by it to the Sussex Company, it is unnecessary to say anything further about the claim of title by the Franklinite Company under the deed from Fowler to the Curtises under the deed of 1850 to them, as that only conveys what did not pass by the deed of 1848. I deem it but justice to say in closing, that so far as regards the Boston Company and Oakes Ames, I see nothing inconsistent with the strictest integrity and good faith. I am of opinion that, by the deed of 1852, it was the intention of the parties thereto to pass over the property in dispute under the name of zinc ore; that the property in dispute belongs to the Zinc Company, both in law and in equity; that the injunction against the Zinc Company should be dissolved, and the injunction against the other parties should be made perpetual with costs.

BROWN, J. The contest in these cases is for the ores of zinc and iron in a tract of land called Mine-hill, in the county of Sussex. The questions are, what title to ores there found the Zinc Company acquired by the deed made to them, dated March 8th, 1852, by the Sussex Zinc and Cop-

per Mining and Manufacturing Company, and what title to such ores the Boston Franklinite Company have, as successors to the Sussex Company, through Oakes Ames and the New Jersey Franklinite Company, by virtue of the exception in the same deed. By it the Sussex Company grants and conveys to the Zinc Company "all the zinc and other ores, except franklinite and iron ores, found or to be found in or upon the *following described premises*, that is to say, that certain farm, piece, or parcel of land, bounded as follows, and consisting of several contiguous tracts. First, the Mine-hill farm." After describing this and other tracts by metes and bounds, the deed proceeds to give license and authority for several purposes, among others, to open shafts, levels, and drains, to mine all sorts of mines and minerals, veins of zinc, copper, lead, silver, gold, and other ores and metals, except the franklinite and iron ores, as therein provided, with free ingress in and upon, and egress from *the said premises* for the purposes aforesaid; and together with all and singular the tenements and appurtenances, &c., and also, all the estate, right, title, interest, property, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to *the above described premises*, and every part and parcel thereof, with the appurtenances.

This deed conveys *in terms* all the zinc ore found or to be found upon the premises described. The words are, "all the zinc and other ores except the franklinite and iron ores," and to those words there is but one grammatical reading. It is all the zinc ores and all other ores except franklinite and iron ores. The exception is from the ores named generally, and not from the zinc ores, unless franklinite is a zinc ore. The words cannot be held to mean all the zinc ores except iron ores, nor all the zinc ores except franklinite, unless franklinite be a zinc ore. If this interpretation seems at all obscure, it is because the words of the description relate to kinds of property not familiar to us. If the same form of description and exception be applied to things in

common use the doubt will be removed, as if a man should sell all the white-oak and other timber on his farm except the chestnut, chestnut is an exception from the other timber, and not from the white-oak. If the sale was of all the white-oak timber except the chestnut, the clause would not be good English, nor the exception good in law; for the exception would not be from the thing granted but from some other thing, contrary to one of Touchstone's quaint rules. The reading of this exception thus—all the zinc ores except the iron ores—would be just as bad as all the white-oak except the chestnut. Nor would all the zinc ore except the franklinite be any better, for it appears in all the pleadings and in all the proofs, and in the arguments of counsel here, that franklinite is considered a mineral species or an iron ore. It therefore cannot be excepted out of zinc ore.

If, then, the exception applies only to other ores the clause should be read, so far as respects zinc, all the zinc ores found or to be found on the premises described. This would give the Zinc Company all the zinc ores, with the right to mine them, although it might be necessary to break down the franklinite and iron ores to get them. The above construction seems verbally accurate, and should be the legal construction, unless there be some other of which the words are capable called for by the intent of the parties. I know of none such. The deed, with this construction, gives the zinc ore not in mass with such admixtures as were not conveyed, but in species. The language of the description of this deed, and that of Fowler, from whom the Sussex Company got its title, is not apt to a purpose of conveying masses of mixed ore in *situ*, the preponderant ore characterizing the mass. A deed with such intent would necessarily describe such masses with some definiteness as to location or boundary, so far as that can be done in relation to this kind of property. The title to an ascertained vein of ore may be given, and the estate is bounded by the walls of the vein, wheresoever they may lead. So as to veins or lodes undiscovered the same rule would apply after discovery, the prevalent ore giving

character to the mass. But the words in these deeds define nothing. The deed from Fowler to the Sussex Company, for example, conveys "all the zinc, copper, lead, silver, and gold ores, and also all metals or ores containing metals," &c., and this deed "all the zinc and other ores."

The descriptions are not of opened mines or ascertained veins or veins not yet discovered, but are such as are universally used in deeds to exploring and mining adventurers. The grantees of such deeds incur the expense of sinking shafts, opening levels and drains, and removing masses of no value, in the full confidence that, whatever they may find within the description of their deeds worth taking away, no matter how situated or mixed, they will have the right to take away. The parties contract in general and sweeping words with reference, in great measure, to the unseen and unknown, and thus create questions *inter se* difficult to adjust when the estate or right is opened to sight and knowledge. Adverse rights under ground, without definite description, must of course be difficult to reconcile; but this cannot control the construction of deeds creating these rights. The right to zinc ore, given by this deed to the Zinc Company, is the dominant right; for the grant must be taken most strongly *contra proferentem*. If zinc ore be found in such combination with other masses not granted as to be inseparable, these masses must pass as an incident to the grant. A *good* exception can only be made of such thing as may be separated from the granted thing. 4 *Cruise's Dig.* 288.

But if this result be doubted, or considered *strictissimi juris*, greater certainty will be found in further considering the words of this deed. The deed conveys, it will be remembered, all the zinc ore found or to be found upon the *following described premises*, that is Mine-hill and the other tracts of land, with the right to mine there, and free ingress into and upon and egress from the *said premises*, and also all the estate, property, title, interest, claim, and demand of the said parties of the first part of, in, and to the *above described premises*.

What is the meaning here of the words "above described premises?" It is insisted that they mean only the ores granted. Suppose they do, then this part of the deed will read "all the estate, title, and interest of the said parties of the first part of, in, and to all the zinc and other ores, except franklinite and iron ores, found or to be found on the above described lands." Supposing what is understood, this passage, so interpreted, will read thus: all the estate, title, and interest of the grantors of, in, and to all the zinc ores and all other ores except franklinite and iron ores. There being no qualification or exception to the grant of zinc ores, the entire title of the Sussex Company to zinc ore passes. This title embraced all the zinc ores undisturbed by the franklinite exception, for that only existed when franklinite was found separate from zinc.

But, in my judgment, the words "above described premises" do not mean the ores granted. When this word "*premises*" is used in the *habendum* it has a fixed meaning. The office of that part of a deed is to fix with certainty the estate granted, and in that connection the word "premises" does mean the thing granted, as described in what precedes the *habendum*. In this deed the word premises, in the *habendum*, means all the ores granted, together with all the interest of the grantors in the lands described.

But the inquiry is not now as to the meaning of the word in the *habendum*, but in the description of the thing upon which the *habendum* is to have effect. The word *premises* sometimes means any statements which precede the use of the word. Sometimes it means lands, sometimes the thing granted.

In the premises of a deed it cannot mean the thing granted, for that is not ascertained until the description is complete. It is twice used in this same description to mean lands—the ore in the lands and the right to enter upon the lands are described as in or upon the *premises*, that is to say the tracts of land described by metes and bounds. When this word is used the third time in description, and the right of the grantor given in the *above described premises*, it is difficult

to conceive how it can mean anything else than in its previous connections. The following described premises and the above described premises go to the same thing with great exactness. The word is held to its meaning of lands by the qualifying words with certainty. Language affords no greater. The doubt suggested arises not from the words in their connection, but from the effect of such general words upon the subject matter of the grant. It is said that they are broad enough to convey the fee of the lands, and so they are. But they will convey no more than the grantor's title, and he should know whether he means to convey that or not, and insert it or not according to his intent. It is true a case may be put in which such use of the word will seem a strange mistake—one, by the way, very unlikely to be made. As if a man owning the fee of lands should sell all the timber on the premises, together with all his estate in and right to the premises. If the land were of large value and the timber of small value, and the consideration proportioned to the latter, the immediate conclusion of the mind would be, this is a mistake, and but little proof would be required to procure a reform in a court of equity. On the other hand, a case may be put in which it would appear to be in exact accord with the intent of the parties, as if a man owning certainly a third part, and having a questionable title to an additional sixth part of lands, should sell the one undivided third part of the premises, together with all his interest in the premises, there would be little doubt that he meant what he said.

But if it appeared that the deed was given in execution of a contract to convey all his estate in these lands, there could be no doubt at all of his meaning. The intent being ascertained, the deed must be so construed, and both the particular and general description have effect. This rule is stated, in 4 *Cruise's Digest* 257, to be "that when a deed first contains special words, and afterwards concludes in general ones, both words, as well general as special, shall stand, for otherwise the general words would have no effect." The case

of *Sumner* v. *Williams*, 8 *Mass.* 176, cited by the counsel of the Boston Company, will not on examination be found to sustain his position. The action was brought on the covenants of a deed made by administrators. The question was as to their personal liability. The meaning of the word *premises* was argued in the case, and Justice Sedgwick discussed it in his opinion. The other judges did not refer to it. The deed, in all particulars, was different from that now under consideration. The administrators had license to sell the lands of intestate from the Court of Common Pleas. They describe the property in the deed as the equity of redemption of which the intestate died seized in the *premises*, and the *habendum* is to have and hold the same. They covenant that, as administrators, they are lawfully seized of the premises; that they are free from all encumbrances except the mortgage deed and dower of the widow; that they had good right to sell, and would defend the same. The question discussed by Justice Sedgwick was whether the covenants extended to the lands, or to the equity of redemption only. It was not material, and was not decided. I think, however, that in saying the word *same* in the *habendum* meant the thing granted, and that the covenants extended no further, he was clearly right. That deed admitted of such construction, in fact required it. Such was the intent of the parties, appearing in every part of the deed.

I think no reference to extrinsic circumstances to aid in ascertaining the intent of the parties to this deed is necessary. But if a doubt does exist the court may look at such evidence. The original rule is clear in its terms. Latent ambiguities arising from evidence of extrinsic circumstances, when the instrument came to be applied to the subject of it, could be removed by the same kind of evidence, but a patent ambiguity could not be aided in this way. Construction of the words was the only remedy, and when that failed the instrument failed to have effect. This rule has been subjected to many exceptions, by which the rule itself is in fact modified. In general, the court may look at the circum-

stances surrounding the transaction at the time of it, and construe the writing in view of them, if they afford any light. This of course does not extend to the alteration of the instrument, but only to settling the sense of the words when they admit of two or more meanings.

Vice-Chancellor Wigram, in his treatise on extrinsic evidence, page 59, says, "every claimant under a will (and the same rules apply to all instruments) has a right to require that a court of construction, in the execution of its office, shall, by means of extrinsic evidence, place itself in the situation of the testator, the meaning of whose words it is called upon to declare." *Ibid.* 57–8.

It is upon the principle above adverted to, namely, that all writings tacitly refer to the existing circumstances under which they are made; that courts of law admit evidence of particular usages and customs in aid of the interpretations of written instruments, whether ancient or modern, whenever, from the nature of the case, a knowledge of such usages and customs is necessary to a right understanding of the instrument. The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed. 2 *Phil. Ev.* 277. "For the purpose of applying the instrument to the facts, and of determining what passes by it, or who take an interest under it, a second description of evidence is admissible, *viz.* every material fact that will enable the court to identify the person or thing mentioned in the instrument, and place the court, whose province it is to declare the meaning of the words of the instrument as near as may be, in the situation of the parties to it."

In the case of *Colpoys* v. *Colpoys*, 1 *Jacob's Ch. R.* 464, the master of rolls says: "In the case of a patent ambiguity, that is one appearing on the face of the instrument, as a general rule, a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction, and not by averment. But in many cases this is impracticable. Where the terms used are wholly indefinite and

equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed, if in such cases the court were to reject the only mode by which the meaning could be ascertained, *viz.* the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule, and call in the light of extrinsic evidence. The books are full of instances sanctioned by the highest authorities both in law and equity. When the person or the thing is designated on the face of the instrument by terms imperfect and equivocal, admitting either of no meaning at all by themselves or of a variety of different meanings referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of evidence of those circumstances that the ambiguity was patent." The master cites *Doe ex dem. Jersey* v. *Smith*, 2 *Brod. & Bing.* 553, in support of his view. In this case Bayley, J., says: "The evidence here is not to produce a construction against the direct and natural meaning of the words—not to control a provision which was distinct and accurately described, but because there is an ambiguity on the face of the instrument; because an indefinite expression is used capable of being satisfied in more ways than one, and I look to the state of the property at the time, to the estate and interest the settler had, and the situation in which she stood in regard to the property she was settling, to see whether that estate or interest or situation would assist us in judging what was her meaning by that indefinite expression."

In the case of *Bradley* v. *The Washington Steam Packet Company*, 13 *Peters' R.* 89, Justice Barbour, in delivering the opinion of the court, reviews a number of the decisions on this subject, and sums up the result in the following words: "The cases which we have thus collected together,

from among the very many which exist, will serve to show in how many aspects the question of the admissibility of extrinsic evidence in relation to written contracts has been presented and decided, and in how many forms, according to the various circumstances of the cases, the principle which we have been considering has been applied. Sometimes it has been applied to deeds, sometimes to wills, and sometimes to mercantile and other contracts. In some cases it has been resorted to to ascertain which of several persons was intended, in others, which of several estates. In some to ascertain the identity of the subject, in others its extent. In some to ascertain the meaning of a term, where it had acquired by use a particular meaning, in others to ascertain in what sense it was used when it admitted of several meanings. But in all the purpose was the same—to ascertain by this medium of proof the intention of the parties, when without the aid of such evidence that could not be done so as to give a just interpretation to the contract. Without attempting to do what others have said that they were unable to accomplish, that is to reconcile all the decisions on the subject, we think that we may lay down this principle as the just result, that in giving effect to a written contract, by applying it to its proper subject matter, extrinsic evidence may be admitted to prove the circumstances under which it was made, whenever without the aid of such evidence such application could not be made in the particular case."

The difficulty arises here, if any, in applying the word *premises* to the subject of the contract. According to the natural construction of the word in its connection it means land, and so construed the deed conveys all the title of the Sussex Company in the lands to the Zinc Company. Is there anything in the surrounding circumstances to show that the parties meant any less? The Sussex Company had no title to the surface of the land, only to certain ores. By reference to the deed from Fowler to this company, we find that he conveyed to it all the zinc and other ores there found or to be found, except franklinite, *when it exists separate from*

zinc. To this exception it may be said, that it amounts to nothing, for franklinite never exists separate from zinc in chemical combination. The meaning no doubt was to except it when not found in mechanical combination with zinc. There was a plausible reason, therefore, for changing the language of the exception, and it was changed in the deed to the Zinc Company. *There* they except franklinite without more. The difference in the effect of these exceptions is unquestionable, and involves all that is in dispute in this cause, but it is not obvious at first reading. The Zinc Company certainly would not readily perceive that by this difference they would lose any zinc not chemically combined in franklinite. This leaves open the question, whether the deed was made by the Sussex Company with the intent of reserving part of the ores they acquired from Fowler, and accepted by the Zinc Company with that understanding. The general clause, including all their title, answers the question exactly if *premises* mean lands, and this answer cannot be put aside unless a good reason can be found for so doing. The reason seems to be the other way. The exception in the second deed is relieved of the obvious infirmity of the first, while the whole description, taking the general clause as referring to the lands, conveys the same, and no more than the same rights.

The general clause, so interpreted, performs its office, which is to guard against omission or inadequate construction. *Burton on Real Property* 167, found in the law library.

By the cases above cited, we are allowed to look further into the surrounding circumstances. One, specially included, is the relation of the grantors to the property or subject of the contract. At the time of the delivery of the deed to the Zinc Company, which I consider to have been after its acknowledgment, there being no direct proof, the Sussex Company in equity had no property. They had contracted, for valuable consideration, with the Zinc Company to convey to it all their stock and property of every kind, and had re-

ceived the consideration. When they delivered the deed therefor, in equity they were merely trustees executing a trust—at law, they were performing a contract. It is true that the contract *may* have been waived, or another substituted, but there is no sign of it in the evidence; and where a deed is delivered, which by its usual and natural construction performs a contract between the parties, the clear presumption is that it was so intended.

In coming to the conclusion that the New Jersey Zinc Company, by their deed, acquired all the title the Sussex Company had from Fowler, and that the decree of the Chancellor should be reversed, I beg leave to add, that I have the highest respect for the legal opinions of the Chancellor.

If in the discharge of my duties here I could defer to the opinions of any judge, I would to his; but my convictions upon the points on which I rest my opinion in this case are strong, and I cannot yield them to those of any other mind.

The decision of the Chancellor was reversed by the following vote:

For affirmance—Judges WHELPLEY, HAINES, ELMER, COMBS, SWAIN—5.

For reversal—Judges VREDENBURG, BROWN, VAN DYKE, OGDEN, CORNELISON, KENNEDY, WOOD—7.

THE MORRIS AND ESSEX RAILROAD COMPANY, appellants, *and* THOMAS GREEN, respondent.

The complainant was the owner of a farm, through which the defendants, the Morris and Essex Railroad Company, in the construction of their work, made an excavation. Commissioners were called, under the company's charter, to assess the damages, from whose award the complainant appealed. Before the hearing of the appeal, H. and W., who had contracted with the company to procure the right of way for them, and to pay the expenses of it, proposed to submit the matter in difference to

arbitration, which was done. By the charter of the company, they were obliged to construct and keep in repair suitable wagonways over or under their road where the railroad intersected any farm. During the deliberations of the arbitrators, the complainant stated that he should require a suitable wagonway over the railroad where it crossed his farm, but H. and W. replied that this was a matter with which the arbitrators had nothing to do, and was no part of the submission. This view was assented to by the arbitrators and both parties. The arbitrators made their award, and H. and W. waited on complainant with the money awarded and the draft of a deed. The complainant objected to signing this deed, on the ground, that it did not in express terms reserve all his rights to a crossing; but finally executed it, on being assured by H. and W., one of whom was a lawyer, that such rights would not be affected by the instrument. The company having failed to put up a crossing after being legally notified, the complainant made it at his own expense, and, by virtue of an authority contained in their charter, sued them at law for the money expended. The company set up the deed as a bar to the recovery. This bill was filed to reform the deed and enjoin the defendants from interposing it as a defence at law. The company filed a demurrer to the bill.

Held that, as between the company and the complainant, H. and W. were the agents of the company in procuring a deed for the complainant's land, notwithstanding the fact that they were bound by a contract with the company to procure the right of way for the railroad over complainant's land, and that representations made by H. and W. to complainant are to be regarded as made by the company, and that the company are estopped from setting up the deed for any purpose so distinctly repudiated in their bargain

That the company, by accepting the deed, ratified what was done by H. and W. in their behalf, and although it is true that no one is bound by his ratification of what has been done in his behalf, unless he is informed of all the circumstances, yet he cannot avail himself of the benefit of the act except *cum onere*.

The company being responsible for the acts of their agents, such a defence would be wholly inequitable and unjust. The complainant should not be compelled to be at the hazard or expense of litigating it. Whether the company, by a correct construction of the deed, are released from the liability imposed by their charter to construct the bridge—*query*.

The injunction granted by the Chancellor against the use of the deed by the company as a defence to complainant's suit at law, *held* a sufficient protection to the complainant without determining the question of his right to have the deed reformed.

This was an appeal from the Chancellor's decree.—See the case reported in Chancery, in 1 *Beasley* 165.

E. W. Whelpley, for appellants.

Chandler and *Frelinghuysen*, for respondent.

The opinion of the court was delivered by

BROWN, J. It appears, from the pleadings and proofs in this case, that Samuel B. Halsey and Freeman Wood, before the railroad company located the extension of their road to Dover, agreed with them, that if they would adopt the route by Rockaway (where they, Wood and Halsey, had property,) to guarantee to the company the right of way clear of expense for a portion of the distance, and to indemnify them from all damages that might arise or be assessed for so much of the right of way, and to pay and satisfy all such damages, and this agreement reduced to writing and sealed; that the respondent, Thomas Green, owned lands in this route, and Halsey and Wood applied to him for the right of way over it, and not being able to agree with him, so informed the company; that the company had the damages assessed by commissioners, pursuant to their charter, and their report filed; that Green, being dissatisfied with the amount reported in his favor, took the proper steps for an appeal, and as appears by the bill and answer, while such appeal was pending, Halsey and Wood agreed with him in behalf of the company, as they said, to arbitrate the question of amount of damages; that the arbitration was had, and the amount awarded paid by Halsey and Wood; that before paying the amount, they insisted upon Green's executing a deed to the company, which Halsey had prepared, by the terms of which Green, in consideration of $800 (the amount awarded to him) paid to him by the company, and the receipt of which was acknowledged, conveyed to the company the right to enter upon his land by their agents, and to take possession of, occupy, and excavate the same, lay rails, and do all other things suitable or necessary for the completion or repair of their road; to have and hold the same to the company, its successors and assigns for ever, for the purposes mentioned,

and for all other purposes mentioned in their charter and the supplements thereto. At the time of the assessment by commissioners, the award of arbitrators, and at the time of giving the deed, Green claimed, that besides the damages he was to receive, the company were bound to make a bridge over the excavation on his land at a place where he had a farm road, and was told, from the beginning, that that question was not involved in the question of damages. He gave the deed, and afterwards gave notice, as required by the ninth section of the charter, to the company that they were required to build a bridge at the place referred to, and that if they neglected to do so, he would build it himself, and look to them for the expense and value of it. The company refusing to build it, Green did it, and sued the company for the cost; the company pleaded the general issue, and gave notice that they would give in evidence the deed above mentioned, and rely upon it as a bar to the action. Green thereupon filed the bill now here, stating these facts, praying to have the deed reformed by inserting an exception of the right to a bridge on the ground of mistake, and to enjoin the company from using the deed as a bar to the action because of the mistake, and further, because such a use of it would be fraudulent. The Chancellor decreed in favor of the complainant on both points. The company appeal from the decree.

The first question is, should the company be enjoined from making such use of this deed?

The proof is plenary of the representation by Halsey and Wood, before the execution of the deed to Green, that it would have no effect upon the right to a bridge, if such existed. Wood says, in his testimony, that Green refused to give the deed on this account, and that he and Halsey labored to show him that it would have no such effect as he apprehended, and that he finally yielded to their view. There is no doubt that Messrs. Halsey and Wood were entirely honest in their statements on this subject, but it is manifest that *they* could not honestly set up the deed for a purpose so dis-

tinctly repudiated in their bargain. They would be estopped in equity.

So, if these representations are to be regarded as made by the company through their agents, they should not be permitted to set up this deed as a bar. It would be a fraudulent use of the deed. They are also estopped. The company do not deny this, but allege that Halsey and Wood were not their agents, and that they had no knowledge of what representations they made to Green, and are not responsible for them. As to the agency, I think the company are mistaken.

The arrangement was, that in consideration that the company would locate their road to suit Messrs. Halsey and Wood they would procure the right of way for the company at their own cost. The agreement on that subject, and the statement in the answer as to it, shows this to be so. The only mode of procuring these rights of way is by agreements between the company and landholders, or assessments between them of the damages on failure to agree. Messrs. Halsey and Wood were therefore to procure agreements between the landowners and the company for the right of way if they could, and to have assessments made if they could not. Is a man who procures a contract to be made between two other men anything but an agent? He may contract to procure the contract for a stipulated sum or any other consideration, but in procuring the contract he is an agent. The parties do not negotiate with each other—he negotiates between them. In this case the title to the right of way must be made to the company—they only can receive it. They say to Messrs. Halsey and Wood, we will take the route you wish, if you will at your own expense procure titles to us for the right of way from the landowners. Between the landowners and the company, Halsey and Wood are agents and nothing else. They make no contract with Mr. Green, but negotiate one between him and the company and for the company.

Again, by receiving the deed, the company ratify what Messrs. Halsey and Wood have done in their behalf. Subsequent assent to an assumed agency is equivalent to a pre-

vious authority. It is true that no one is bound by his ratification of what has been done in his behalf, unless he is informed of all the circumstances. He may in such case withdraw his approval and repudiate the act if he has been deceived, but he cannot avail himself of the benefit of the act except *cum onere.*

In this case, if the company had been surprised by the representations made by Messrs. Halsey and Wood, they might have repudiated the deed, even after the acceptance of it; but they cannot hold and use it free of the equities arising from the manner in which it was obtained. By the acceptance the act done in their behalf was ratified by holding the deed; and insisting upon their right to use it, they are now ratifying it after notice of what was done at and before the time it was delivered.

The effect upon the company's right under the deed is the same as if Messrs. Halsey and Wood had acted under the usual agency to procure titles for them. What they said to Mr. Green has the same effect as if it had been communicated by the company, provided it was within the scope of such an agency.

The rule is stated in *Story on Agency,* § 135, as follows: "If the agent, at the time of the contract, makes any representation, declaration, or admission touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself." These representations were made at the time of the delivery of the deed, and Mr. Wood says that, but for them, he believes it would not have been given.

I think it is clear that the Chancellor rightly decreed that the company should be enjoined from setting up the deed or award as a bar in the action at law for the cost or value of the bridge in question.

The company being responsible for the acts of their agents, such a defence would be wholly inequitable and unjust. The respondent should not be compelled to be at the expense or hazard of litigating it.

The remaining question in the case is, whether the deed

should be reformed so as to contain an exception of the complainant's right to the construction of a bridge by the company on the ground of mistake.

It is objected that the mistake, if any, was one of law, and not of fact. Such mistakes may have been corrected in equity in cases like the present. It was occasioned here by the advice and opinion of the agents of the company, one of them a lawyer, and both men of high character for intelligence and integrity. It is not a mere mistake of the party asking a reformation of the instrument, but one induced by the agents of the other party. It will not do to say that Mr. Green ought not to have trusted his adversaries. They were not such as to the bridge right. They had no interest in that question, and throughout the negotiation, including the assessment, award, and the execution of the deed, maintained to Mr. Green that it had nothing to do with the right of way they were to procure for the company.

But the case seems to belong rather to the jurisdiction of the courts of equity in cases of constructive frauds than that of mistake. It may, notwithstanding the case of *Brearley* v. *The Delaware and Raritan Canal Co.*, *Spencer R.* 236, be questioned whether, upon a fair construction of this deed, it does release the company from the charter obligation to construct roadways. This point is not directly before the court, nor is it needful to express any opinion upon it in order to give the complainant relief. The injunction decreed by the Court of Chancery is sufficient for that purpose, so far as respects the suit now pending at law; and if desired by the complainant, this court would no doubt order it enlarged so as to embrace any future suit for the same cause of action.

Decree of the Chancellor affirmed, excepting the clause relating to the reformation of the deed.

The Chancellor's decree was affirmed by the following vote:

For affirmance—Judges BROWN, COMBS, ELMER, HAINES, KENNEDY, OGDEN, VAN DYKE, VREDENBURGH—8.

For reversal—None.

JOSEPH H. CAMPION *vs.* ROBERT KILLE.

Bill on a mortgage—answer usury—proof that the contract was executed in Pennsylvania.

Held—1. That the proof did not support the answer.

2. That this court will not officially recognize the usury laws of other countries.

3. That this court would not reverse to enable the defendant to amend his pleadings and adduce his proof.

The lien of the writ of attachment before judgment does not take priority over a previous unregistered mortgage.

This was an appeal from the opinion of the Chancellor, as reported in 1 *McCarter, p.* 229.

It was argued on appeal by

A. Browning, for appellant.

P. L. Voorhees, for respondent.

The opinion of the court was pronounced by

VREDENBURGH, J. The bill states that, on the 7th of April, 1858, the defendant gave a mortgage on his property for the amount of $7500, payable in two years with interest, which mortgage came afterwards, by divers assignments, to the complainant; that the mortgage was recorded on the 11th May, 1859; that, on the 9th February, 1859, Brown and Goodwin sued out of the Supreme Court of this state a foreign attachment against said Kille, upon which judgment was entered, on the 16th April, 1860, for $6542.

Kille answers that, before the execution and delivery of said mortgage, he had borrowed and received from Steele & Co., the original mortgagees, divers sums of money, upon and by reason of an agreement to pay them usurious interest, which sums, with the usurious interest thereon at the time of the delivery of the mortgage, amount to the sum of $3900; that on the 27th March, 1858, Steele & Co. corruptly agreed

with him, Kille, to deliver to him circulating notes of the Bank of Pennsylvania to the nominal amount of $4500, and that he should give to Steele & Co. the bond and mortgage in question for a sum sufficiently large to cover not only the said sum of $3900 but also 80 per cent. of the nominal value of said circulating notes, well knowing that said notes were worth only from forty-seven to forty-nine cents on the dollar, and that he did receive the said notes, amounting, at eighty cents on the dollar, to the amount of $3600, which with the $3900 makes the sum of $7500, the amount of said mortgage. Neither the bill or answer avers the place of contract.

The bond and mortgage are good by universal law, and therefore the bill is good without any averment of place. Usury is matter of local law, and therefore the averment of usury in the answer necessarily intends that the facts stated constitute usury under the local laws of this state.

But the proof shows that this contract was executed in Pennsylvania. The contract could not therefore have been usurious under the laws of this state, and the answer is consequently entirely unsupported by the evidence.

But it is said that the facts stated show usury under the laws of Pennsylvania. But this can constitute no defence, for two reasons: first, because it is not averred in the answer that such facts constitute usury under the laws of Pennsylvania; and secondly, if such allegation had been made, it is entirely unsupported by any evidence. We do not know officially what the laws of every nation of the earth are respecting usury; we know they vary more or less in almost every government, and when it is necessary to manifest what such local laws are in our courts, it should appear by averment and proof.

The same answer may be given to the suggestion, that by the laws of Pennsylvania the mortgagee can only recover the sum actually advanced upon the mortgage, there is no averment of such law, and if there was, there is no such proof.

Nor could it be proper in this stage of the case to reverse

the decree, in order to send it back to Chancery to enable the defendant to amend his pleadings and adduce his proof.

The custom of Chancery is not to allow a defendant, who has permitted his time to answer to pass by, additional time to answer in order to set up usury, much less will it do so when the cause has regularly progressed upon pleadings and proofs to a final hearing.

As to the question of priority between the attaching creditor and the complainant, the statute, *Nix. Dig.* 124, § 18, by its very terms, makes the mortgage not recorded according to its provisions void only as against subsequent judgment creditors or *bona fide* purchasers or mortgagees for valuable consideration not having notice thereof, but does not make it so as against creditors in attachment.

By the act, *Nix. Dig.* 33, § 7 and 8, the attachment only binds the property and estate of the defendant in attachment, and cannot affect the estate of other persons therein acquired previous to the issuing of the attachment.

I think the decree should be affirmed.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges BROWN, COMBS, CORNELISON, ELMER, HAINES, OGDEN, SWAIN, VREDENBURGH, WHELPLEY, WOOD—10.

For reversal—Judge KENNEDY—1.

RACHEL SKILLMAN *vs.* JOHN G. SKILLMAN and others.

When a married woman, with the consent of her husband, contracted for the purchase of a lot of land, which was afterwards conveyed to the husband, who paid the purchase money and erected a house on the lot, part of the cost of which was paid by the husband, and the balance was

secured by his bond and mortgage on the premises, which was afterwards paid by the wife by money derived from her own earnings—

Held, that these circumstances fail to establish any resulting trust in the wife, or show any interest in the property in her paramount to the title of the husband.

By the common law, the earnings of the wife by the product of her skill and labor belong to the husband. They do not become the property or the wife, even in equity, without a clear, express, irrevocable gift, of some distinct affirmative act of the husband divesting himself of them or setting them apart for her separate use.

An injunction, which had been allowed at the instance of the wife, to prevent a judgment creditor of the husband from satisfying his judgment out of the land, held to have been properly dissolved.

This was an appeal from the decree of the Chancellor in the case reported in 2 *Beasley, p.* 403.

Leupp, for appellant.

Speer, for respondent.

The opinion of the court was delivered by

HAINES, J. The complainant, by her bill, claims to have an equitable interest in a certain house and lot of land, the legal title to which was in her husband at the time of his death, and she seeks to have it protected against a judgment obtained by the defendant, John G. Skillman, against her husband, in his lifetime, on a bond and warrant of attorney to confess judgment, upon the ground that the judgment was without consideration and fraudulent and void. The equity of the bill rests in allegation of a right and interest of the complainant in the house and lot, and in the fraudulent intent of the defendant, John G. Skillman, in procuring the judgment. The charge of fraud is fully denied by the answer in response to the bill; so that if the complainant has any interest in the property, and was in a situation to question the validity of the judgment, on this explicit denial of the fraud charged the injunction might have been properly dissolved. But the case made does not show such an interest in the property as would entitle her to protection against

the judgment, even if it were fraudulent. Her claim is not based on a right of dower, and if it had been it would have needed no protection in this form, as the judgment against her husband could not affect her dower. But she claims by a right in equity paramount to the legal title of her husband. She insists that, having negotiated for the purchase of a lot of ground and for the building of the house, and paid a considerable portion of the purchase money, a trust results to her. On examining the allegations of the bill, it appears that she, with the knowledge of her husband, negotiated for the purchase of the lot, and that it was conveyed to him, and he paid the purchase money; that afterwards a contract was made for the erection of a small house on the lot, at the cost of six hundred and seventy-five dollars, of which sum five hundred dollars were secured by his bond and his and her mortgage on the property, and the residue, one hundred and seventy-five dollars, paid to the contractor. It is not alleged to have been paid by her, and the presumption is that it was paid by her husband. Thus far the whole consideration money on the purchase of the lot and the cost of the building were paid and secured by the husband. After this, and until May, 1854, she paid the yearly interest on the bond and mortgage and one hundred dollars of the principal. She afterwards contributed to the monthly payments on two shares of Mechanics Building and Loan Association, purchased by him, until he became entitled to a loan of four hundred dollars, which was taken and secured by a mortgage on the house and lot, and with that money the residue of the sum secured by the original mortgage was paid. She afterwards contributed to the monthly payments due by way of interest on the loan, until the value of the two shares were so enhanced as to be nearly sufficient to pay off the last mortgage, all of which payments so made by her were almost entirely from her own earnings, her husband contributing but little towards it. Admitting the entire truth of all these allegations, they fail to establish a resulting trust or to show any interest in the property paramount to the

title of her husband. By the common law, the earnings of the wife, the product of her skill and labor, belong to the husband. They do not become the property of the wife, even in equity, without a clear, express, irrevocable gift or some distinct affirmative act of the husband divesting himself of them or setting them apart for her separate use. There is no allegation of any such act here. She was permitted to apply the product of her labor, not to her own use, but to the payment of her husband's debts. Her object was truly praiseworthy and her efforts provident. She meant to secure a home for herself and her family; and it may be regretted that they had not taken proper measures to accomplish that purpose. As the business was transacted, the title to the house and lot was in her husband, and the purchase money and the cost of building paid by him, and out of money belonging to him. The legal and equitable title vested in him. There was nothing done or suffered to divest him of such title, even as between him and his wife, much less as between him and his creditors. The bill was properly dismissed, and the decree of the Chancellor must be affirmed, but, under the peculiar circumstances of the case, without costs.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges BROWN, COMBS, CORNELISON, ELMER, HAINES, KENNEDY, OGDEN, FORT, SWAIN, VREDENBURGH, WHELPLEY—11.

For reversal—None.

JOHN BARNETT, appellant, *and* THOMAS V. JOHNSON, respondent.

When the Morris Canal Company take land under their charter the whole present interest is vested in them, and that whether they take by condemnation or by deed.

Barnett *v.* Johnson.

In such case the prior owner has no interest in the land taken by the company which he can protect by injunction.

Two classes of rights, originating in necessity, spring up coeval with every highway; the first relates to the public passage; the second, equally perfect, but subordinate to the first, relates to the adjacent owners. Among the latter is that of receiving from the public highway light and air.

The Morris canal is a public highway. It is not the less a highway because of the tolls and by reason of its being subject to the regulations of the company.

Owners of land adjacent upon the Morris canal have the privilege of receiving from it light and air; provided, in so doing, they do not interfere with the most convenient use of the canal as a public highway, or with any of the regulations of the directors made *bona fide* for that purpose.

he complainant owned a lot in the city of Newark, adjacent upon the line of the Morris canal, and built a house touching the line, with windows facing the canal. *Held*, that this court will restrain the defendant, holding under the company, from erecting a building over the canal so as to shut up the complainant's windows.

Upon the filing of the complainant's bill in the Court of Chancery, an injunction was granted *ex parte*. The defendant, having filed his answer, moved to dissolve. This motion was argued before Mercer Beasley, esquire, master, &c., to whom the matter was referred by the Chancellor, (Williamson) he having been of counsel with the defendant in relation to matters contained in the bill. Upon recommendation of Master Beasley, the Chancellor made an order dissolving the injunction. From this order an appeal was taken.

F. T. Frelinghuysen, for appellant.

O. S. Halsted, for appellee.

The opinion of the court was delivered by

VREDENBURGH, J. The complainant in the Court of Chancery, who is also the appellant in this court, owns a house and lot in the city of Newark binding on the east upon Broad street, and on the south upon the Morris canal. Over this last the defendant, under a license from the canal company, proposes springing an arch, and erecting a building,

several stories high, touching the house and shutting up the windows of the complainant.

An injunction is prayed.

The company was chartered in 1824. In 1828 and 1830 they located and constructed the north side of their canal upon a portion of the south side of the complainant's lot, to wit, a portion, in the shape of a wedge, three feet wide upon Broad street, and running back one hundred feet, to a point in the rear. The balance of the land wanted was obtained from other parties. After it was built, to wit, in 1832, the complainant erected his said house with several windows facing upon the canal.

In 1837 the proceedings, theretofore instituted under the charter to condemn this gore, being deemed imperfect, the company paid the complainant the consideration money, and he executed to them a release of all his interest in the same.

It is admitted that the building the defendant proposes to erect is not wanted for any purposes connected with the canal, or for the most perfect enjoyment by the company of all their corporate franchises.

The complainant insists that he is entitled to relief.

First. Because whether the company hold this gore by condemnation or release, they acquire thereby only a right to construct their canal upon it, and to use it for canal purposes; that all other interests are reserved to himself; that this building would in fact be on his own, and not on the defendant's land.

Second. Because this canal is a public highway, and he the adjacent owner, and that he has thereby of common right the privilege of receiving light and air from it without this obstruction.

Third. Because, in 1832, he erected his said building upon the faith that the canal had been dedicated as a public highway by the company, and that thence a contract is implied that they would put it to no use inconsistent with that dedication detrimental to his building.

The company insist that they own the *locus in quo*, and have a right to do with their own as they please.

The complainant, to entitle himself to relief, must show not merely that the defendant had no right to put up this building, but also an actual affirmative right to prevent it.

First. What is the operation of the titles under which the company hold this gore? Upon this point I am of opinion that the whole present interest is vested in them, and that, too, whether they hold under the condemnation or under the release.

The 6th section of the charter enacts, that after condemnation, the estate, right, property, and interest in the premises shall immediately vest in the company, to be held as long as they shall be used for the purposes of said canal. The release, in terms, conveys the same thing for ever. It is still used, and if the defendant's building be put up, it would still continue to be used for the purposes of a canal. They would take by release certainly, if its terms were broad enough, as great an estate as they could by condemnation. If by condemnation the estate, right, property, and interest vested in the company, how could there remain any in the complainant? The charter vested in the company not merely a right to use it for canal purposes, but the entire estate, right, property, and interest in the premises as long as they shall be used for the purposes of the canal. Whether the company then hold under the one or the other, the complainant can have no present interest, estate, right, or property in this gore as owner or possessor. He has parted with the entire fee. He has given a deed for these interests and received the purchase money. To maintain that he still has any, would be to enable him to retain that for which he has been paid. It would deprive these conveyances of their ancient force, and of the very force which the charter expressly declares they shall have, and which, so far as I am aware, universal usage has always given them. It would be retaining in the grantor uncertain and indefinite rights, against the express language of the grant, as well as against the express statutory enactment. It would disenable every turnpike, railroad, plank road, canal, and, indeed, every cor-

poration which holds land by statute or by contract, from putting up any building or improvement upon their lands, or using them for any purpose, except what could be shown as strictly necessary for the enjoyment of their corporate rights, and that, too, when it would do no injury to the grantors. To so construe the conveyance in this case would be to enable the complainant to do the very thing of which he now complains, and to annoy others, instead of being annoyed himself; for if the defendant cannot erect this building because of an interest retained as between these parties, the complainant certainly can. It appears to me that the fee to this gore is in the company, and that, as between them and the complainant, they can do with it as they please, so long as they do not abandon it for the purposes of the canal.

If the complainant can therefore enjoin the defendant, it is not by virtue of his being or having been the owner of this gore. He must show some other affirmative right, and to this end he insists—

Secondly. That the canal is a public highway, and he the adjacent owner, and that, as such, he has of common right the privilege of receiving from it light and air.

This leads to two inquiries.

First. Is the Morris canal a public highway?

Second. If it is, has the complainant, as an adjacent owner, the right of receiving from it light and air.

First. Is the Morris canal a public highway.

The 25th section of the charter enacts that the said canal, when completed, shall for ever thereafter be esteemed a public highway, free for the transportation of all produce, &c., upon payment of the tolls, &c.

It has been completed many years, and is now still in full operation. It is therefore, by express legislative enactment, a public highway. Is it not also so in its intrinsic nature? A public highway is defined to be a public passage common to all the people. There are various kinds of them, differing in their origin, their mode of construction, the vehicles and motive power used upon them, the cheapness and speed with

which they may be travelled upon, and on that account requiring and subject to different police and municipal regulations, but all agreeing in what constitutes them public highways, *viz.* in being public passages common to all the people. Oceans and seas are the highways of nations; arms of the sea and navigable rivers are the highways in or between different states; our common roads, turnpikes, canals, plank roads and railroads, as generally used and constructed, either directly or indirectly by the sovereign power, or recognized by it, are equally, however differing in their mode of uses, public passages common to all the people.

This act of incorporation is entitled an "act to form an artificial navigation between the Passaic and Delaware rivers." It gave the company the power to build it, and to all the people the privilege to use it upon paying the tolls. The state did not deem it expedient to construct the work itself, but constituted the company its agents for that purpose. It paid the corporators with the tolls. The consideration to the state for its grant of franchise was the advantage to the people from the construction of this improved highway. The company accepted the charter, built the work, and dedicated it to the public as a highway.

It is not the less a highway because of the tolls—they are only an equitable mode of raising the taxes necessary to its construction and repair—nor on account of its being subject to the regulations of the company, requiring that passengers and merchandise should be received only at certain points—nor on account of any other regulations of the directors, because all these are only to make it not less, but more of a highway, a more perfect public passage common to all the people. If a common road is a public highway because it is a public passage common to all the people, is not the canal much more so? Where one person or one ton of merchandise passes over the common road, do not fifty pass over the canal?

The canal is therefore, by its nature, by long use, by dedication, and by express statutory enactment, a public highway.

Second. Has the complainant, as adjacent owner upon this highway, of common right the privilege of receiving from it light and air? If he has the right, it is not of much consequence how it originated, or by what name we may call it. For want of a better, I shall call this supposed right, as it was called by one of the counsel, *the right of adjacency.* Rights of this kind exist by as natural a law as the rights of occupancy.

A man's first instinct is to hold fast that which he has, his next, to seize that which is nearest to him. This idea is recognized in its broadest sense by the law of nations, in conceding to every independent community the control over the tide waters which surround its shores. The lords of the land are the lords of the circumjacent seas. All riparian rights are but instances of the same general law.

The question before us is not whether this canal company may not be its own riparian owner, nor what the company or public may do on the dedicated land by virtue of their eminent domain or for the purposes of a highway—nor is it a question as to the powers of a company to regulate according to their discretion the whole and every question respecting the construction, repair, mode of use, and government of the canal. The question is clear of everything respecting the full enjoyment by the corporation of all the franchises connected with its creation. But the question is, what the private owner of the fee of a public highway may do on the dedicated land, not at and below, but at and above the natural surface of the soil. Whether the owner of the fee of the road-bed can, without any purpose to improve the highway, or of adding to its most convenient use in the mode its nature requires as a public passage common to all the people, build up walls on both sides of it several stories high, shut out the *media* of light and air from, and hermetically seal up the adjacent buildings put there since its construction.

There are, it appears to me, two classes of rights, originating in necessity and in the exigencies of human affairs,

springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage, the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air.

In the first place, has not the adjacent owner upon the "*alta regia via*," the ordinary public highway, of common right the privilege of receiving from it light and air? Universal usage is common law. What has this been? Men do not first build cities, and then lay out roads through them, but they first lay out roads, and then cities spring up along their lines. As a matter of fact and history, have not all villages, towns, and cities in this country and in all others, now and at all times past, been built up upon this assumed right of adjacency? Is not every window and every door in every house in every city, town, and village the assertion and maintenance of this right?

When people build upon the public highway, do they inquire or care who owns the fee of the road-bed? Do they act or rely upon any other consideration except that it is a public highway, and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. What must be the consequence to permit the accidental owner of a part or the whole of the road-bed to wall up or throw a thin curtain in front of the adjacent buildings, or by any other contrivance shut out from them the light and air? Suppose the owner of the fee should try the experiment to the east of the complainant's house, and wall up Broad street, would it be tolerated for a moment, or if enforced, would it not soon turn our streets into tunnels, and seal up cities in darkness?

If it be said that there are no cases sustaining this right, so there are none establishing this right to light and air at all or to the right of passage. It is a right founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactment and all judicial decision. It is the mode by which the sovereign power, in the exercise of its eminent domain, since land has become the object of private ownership, "*ab imo usque ad cœlum*," at the same time that it creates a right of passage, opens up and reserves to all, as the increasing density of the population demands it, the use of the common elements of light and air.

We cannot conclude otherwise than that a right so essential, so universal in its exercise in all time and among all nations, exists, not, as was said in the case of *Gough* v. *Bell*, 2 *Zab.* 441, by a common law local to New Jersey, but by a law common to the whole civilized world.

If this right exists with respect to the ordinary highway, does it not exist with respect to this canal company?

It might, perhaps, be sufficient to say to this, that from time immemorial before the passage of this charter, the adjoining owner upon every public highway had of common right the privilege of receiving from it light and air, and that this canal, by its intrinsic nature, by long uses, by dedication, and by express statutory enactment, was such highway.

Why should this canal be an exception to this general rule? Does the complainant's receiving from it light and air at all interfere with its being a highway, or its most perfect and full operation or its police regulations in the slightest degree impair its convenient and profitable use? Did not the legislature intend it should be a public highway in the usual acceptation of the term? Must we not say they did, unless it appears upon the face of the charter that they did not? The right of adjacent owners to light and air from

the public highway was at the time of the enactment of this charter as well known as universally acknowledged a right as necessary to the public interest as the right of public passage itself. Can we assume that the legislature meant it should be a highway for some purposes and not for others?

When they declared it such, did they not intend that it should be a highway to all parties brought in relation to it? Can we assume that they intended it should be a highway for the purpose of having the immunities of the highway, and not to furnish all the advantages of its being such? That it should be a highway in being protected from nuisance, and not a highway for the purpose of affording breathing room for the increasing population which through all succeeding times might dwell upon its banks.

Our turnpike charters generally provide for taking the entire fee, but have no clause declaring them to be highways. The legislature seem to have thought that their nature sufficiently declared them to be such.

In the charters of our canals, rail and plank roads, they are generally declared to be such. Are we to declare, with respect to all these, that they are highways only for the purpose of public passage, and that the accidental owner of the fee of the road-bed, whether such owner be the company or a private individual, can in all these cases, for no purpose connected with the public right of passage, shut up the doors and windows of all the adjacent houses "*ex vi termini?*" When a strip of land is declared a public highway, the adjoining owner has a right to light and air from it. The column of light and air above the road-bed, whether of land or water, is as much part of the highway as the road-bed itself. Take them away, and there would be left no public passage. By its being declared a highway by the sovereign power, the light and air above it become again the common property of all, which all may breathe and use whenever they may legally touch it, whether in the road or along its sides. What good reason exists why this kind of highways should differ in this respect from the ordinary ones? This

right to receive light and air is subordinate to every purpose connected with the full enjoyment of public passage. The same necessity exists for it here as in that of the ordinary highway. It is the common understanding of the public. A very large proportion of the towns and villages in the state are built up along them. The facilities they afford soon give rise to all kinds of improvement along their lines; very large amounts of property soon become invested upon the assumption of these rights, and they are increasing in an increasing ratio year by year. Can we say that it was not to secure these very interests, among others, that the legislature declared that they should be esteemed public highways? No harm can arise, as I can see, from recognizing the existence of this principle as regards all our highways, those built by corporations as well as those built by the state. It does not interfere with, for it is subordinate to the exercise by the corporation of all its corporate powers and the enjoyment of all its corporate rights. It yields to the right of passage and to all rules and regulations made "*bona fide*" for its greater safety and convenience. The adjacent owners wi l not be perplexed with questions as to who owns the road-bed, or whether this one owns half, or a quarter, or the whole. Each one gets what he is entitled to, *viz.* the light and air from the whole highway, and not to a half, or, as would be the case with this complainant if he had to depend solely upon his owning the gore, an *infinitesimal* portion of it.

In case the canal, turnpike, or railroad ceases to be such the public highway still continues. The streets, villages, and towns that have been built up along their lines cannot be sealed up in darkness by whoever may be the accidental owner of the road-bed until it is legally vacated. When streets and villages have been built up along a public highway the right to light and air from it become vested, and even the legislature would have no more right to deprive them of it without compensation than they would to draw off the water from a navigable stream. The legislature have declared this canal a public highway. Why should we

abridge the term of its accustomed force? Why annul at one sweep, now and for all time to come, the right to building front and breathing room upon all the turnpikes, canals, plank and railroads in the state, and give to whoever may be the accidental owner of the fee the right to shut up in darkness all the structures along their lines?

I am of opinion that the Morris canal is a public highway, declared so by the legislature, among other things, to create and protect these rights of adjacent owners, and that the complainant, as such, has of common right the privilege of receiving from it light and air, and consequently is entitled to his injunction.

This makes it unnecessary to consider the complainant's third ground, *viz.* that the company, as owners of the road-bed, have dedicated it, and that thence springs an implied contract that he will not shut off the light and air. This appears to me but a different statement of the right of adjacency. The complainant can only raise the contract upon the existence of his right as an adjacent owner. He has no interest in the road-bed; and if he has no rights as adjacent owner, the law could raise no implied contract that those rights should not be disturbed. His right is still that he owns the land adjoining upon the highway, and does not depend upon who owns the whole or fractions of the road-bed, or how it was made a highway, whether by private dedication or by public authority, but upon the simple fact that it is a public highway, and he the adjacent owner.

The order of the Chancellor dissolving the injunction was reversed by the following vote:

For affirmance—None.

For reversal—Judges ARROWSMITH, HAINES, POTTS, VALENTINE, CORNELISON, HUYLER, RISLEY, VREDENBURGH, GREEN (Chief Justice), OGDEN, RYERSON, and WILLS—14.

The cause was thereupon remitted to the Court of Chancery, where an order was made for a perpetual injunction against the plaintiff.

NOTE.—The reporter is indebted to James Wilson, esq., for a copy of the above opinion, which, although pronounced at the term of November, 1856, has never before been printed, and it was considered of sufficient interest and importance to justify its publication at this time.

CAROLINE NORRIS, ADELINE THOMSON, and others, appellants, *and* THE EXECUTORS OF JOHN R. THOMSON and others, respondents.

[Decided November Term, 1863.]

A testator, by his will, bequeaths to his wife specifically all that portion of his personal estate commonly known as goods and chattels, such as plate, furniture, horses, carriages, &c., and immediately after gives and devises "all the rest and residue of *my* real and personal estate" unto certain persons in trust for various uses and purposes, among which are, to give to each of five legatees named, two hundred and fifty shares of certain stock which testator had at the making of his will and at the time of his death. And the question being which of the bequests of the shares of stock were specific or general bequests—it was *held*

That it seems to be conceded that if a testator bequeaths to a person a certain number of cows or sheep or shares of stock it is a general legacy; but if he add the word *my* cows, *my* sheep, or *my* shares of stock, it is a specific legacy, although in both cases he may be, at the time of making the will, and thence to his death, the owner of the number of the cows, sheep, or shares mentioned in the will.

In this case the testator, having otherwise disposed of all his personal property except the stocks and bonds, concerning which this question arises, and there being no other personal estate but his stocks and bonds on which the residuary bequest could operate, his describing such residue as "*my* personal estate" is equivalent to saying *my* stocks or *my* bonds, and makes the legacies specific, and not general.

Norris v. Executors of John R. Thomson.

This was an appeal from the decree of the Chancellor.

A. O. Zabriskie, for appellants.

Bradley, for respondents.

The opinion of the court was delivered by Judge Ogden, but the reporter has been unable to obtain a copy of it. The following opinion was delivered by Judge Van Dyke, who voted with the majority of the court to reverse the decision of the Chancellor.

VAN DYKE, J. The question presented to the court between certain of the legatees under the will of John R. Thomson, deceased, and the executors of the said will is, whether the legacies in question are specific or general.

By his will, the testator first bequeathed to his wife, specifically, all that portion of his personal estate, commonly known as goods and chattels, such as his plate, furniture, horses, carriages, &c.

Immediately after this he declares as follows: "All the rest and residue of *my* real and personal estate, of whatever nature or kind, or wherever situate, I give, devise, and bequeath unto John M. Read, Charles Macalester, and Alexander H. Thomson, their heirs, executors, and administrators, in trust for the following uses and purposes:

First. To give to my sister, Mrs. Caroline Norris, two hundred and fifty shares of the capital stock of the New York and Baltimore Transportation line; to my sister, Adeline Thomson, two hundred and fifty shares of the capital stock of the said line; to my sister, Amelia Read, wife of the Hon. John M. Read, two hundred and fifty shares of the capital stock of the said line; to my nephew, Alexander Hamilton Thomson, one hundred and twenty-five shares of the capital stock of the said line, and to my niece, Elizabeth Norris, one hundred and twenty-five shares of the capital stock of the said line."

He then gives to five of his friends five bonds, of $1000 each, of the Delaware and Raritan Canal Company and Camden and Amboy Railroad and Transportation Company, redeemable in 1889, one to each legatee.

He then gives an annuity of $500 during life to his brother, Edward R. Thomson.

He then directs that, from the income of the *residue* of his estate, there shall be paid to his wife the sum of $10,000 annually, with the power to devise and bequeath the principal to certain of his relatives, and also gives to her the disposition of the surplus of such income, if any there shall be.

It is conceded by the pleadings that the testator left sufficient estate to answer all the requirements of the said will.

It is also admitted by the pleadings and the inventory that the testator, at the time of making his will, and from thence to the time of his death, was the owner of the shares of stock and the bonds mentioned in his will, and more of the same kinds.

The question now arises whether these bequests of the shares of stock and the bonds are specific or general legacies, or rather the question is, whether it was the intention of the testator to make them general or specific. We have but little difficulty in understanding what constitutes a specific legacy, and what a general one, but from the peculiar language, so often made use of in wills, the courts have had great difficulty in determining whether it meant the one thing or the other; and while the judicial decisions on the question have been very numerous, the one way and the other, but very few settled rules can be gathered from them.

It seems to be conceded, that if a testator bequeaths to a person a certain number of cows, or sheep, or shares of stock, it is a general legacy, but if he add the word *my* cows, *my* sheep, or *my* shares of stock, it is a specific legacy, although in both cases he may be at the time of making the will, and thence to the time of his death, the owner of the number of cows and sheep and shares of stock mentioned in the will. This seems to be at first sight a rather remarkable distinc-

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A. O. Zabriskie, for appellants. ...en found in wills. ...ersal, is always to be

Bradley, for respondents. ...questions, and that is, testator. This, if it can

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VAN DYK... ...this be a general legacy, the executors would

tween cer... ...liberty, at the death of the testator, if these

Thomso... ...then worth in the market $100 per share, to sell

wheth... ...at price, and at the end of a year, when they may

P... ...fallen to $20 per share, purchase them again, and hand

ci... ...over to the legatees in their reduced condition, and ...the difference in a wholly different direction. This the ...testator could never have intended.

But we need only add the fact of the possession of these ...stocks and bonds by the testator at the time of making the will, and thence to the time of his death, to the language of the will itself to ascertain the intention of the testator. When he devised and bequeathed all the residue of his estate to the individuals named as trustees, having previously disposed of all his goods and chattels to his wife, he had nothing left of personal property but his stocks and bonds. In that devise and bequest he *does* call it *his* estate, real and personal, and when he applied that language to his personal estate he must have intended to apply it to his stocks and bonds exclusively, for he had nothing else to which it could apply; and it is equivalent to saying, I bequeath *my* stocks and bonds, now in my possession, to these gentlemen, who are to be my executors, to distribute and hand over to my legatees, at my death, according to the directions of my will.

I am aware that these individuals are made trustees of the

hus committed to them, and this was quite proper, *ary*, for the great bulk of his estate was to be luring the life of Mrs. Thomson, and to con- tees with regard to this part of the estate nal; but they are also made executors of not in the character of trustees, but as they were to take charge of the legacies now ideration, and distribute them among the lega- ney could not retain them more than a year at most, ether they be specific or general, and they deal with them the same as all other executors deal with such legacies, just as if there had been no other property confided to trustees by the will.

The true interpretation, then, of these clauses in the will is, that he gives to his executors these shares of stock and these bonds, which he then owned, and which he then declares to be his stocks and bonds, to be by them distributed and handed over to the legatees in the manner directed by the will. This is what the testator unquestionably intended. He simply made his executors his agents, as is always the case with specific legacies, to do this particular thing, that is, to pass over the particular thing specified and bequeathed, whether cows, sheep, or stock, to the person or persons for whom they are intended. This makes the legacies specific, and not general. In this way, and in no other, can I read the will.

The decision of the Chancellor was reversed by the following vote:

For affirmance—Judges COMBS, ELMER, WHELPLEY—3.

For reversal—Judges CORNELISON, FORT, KENNEDY, OGDEN, VAN DYKE, VREDENBURGH—6.

CASES DETERMINED

IN THE

COURT OF ERRORS AND APPEALS,

FROM MARCH TERM, 1861, TO NOVEMBER TERM, 1863, INCLUSIVE,

IN SOME OF WHICH NO OPINIONS WERE DELIVERED, AND IN THE OTHERS OPINIONS WERE READ, BUT THE REPORTER HAS BEEN UNABLE TO OBTAIN THEM.

Between JEREMIAH MCKIBBIN, appellant, and BENJAMIN H. BROWN, respondent.

[Decided at March Term, 1861.]

This case is reported in Chancery, in 1 *McCarter* 13.

P. L. Voorhees and *Browning*, for appellant.

Beasley, for respondent.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges BROWN, COMBS, CLAWSON, HAINES, OGDEN, SWAIN, VREDENBURGH, WHELPLEY, WOOD—9.

For reversal—CORNELISON, KENNEDY, VAN DYKE—3.

Between NEWTON M. WARDWELL, appellant, and MOSES TAYLOR, respondent.

[Decided at June Term, 1861.]

Hayes and *Bradley*, for appellant.

L. C. Grover and *Frelinghuysen*, for respondent.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges BROWN, COMBS, CORNELISON, KENNEDY, OGDEN, RISLEY, SWAIN, VAN DYKE, VREDENBURGH—9.

For reversal—None.

Between HARRIET BROWN, appellant, and OTIS H. BROWN, respondent.*

[Decided at March Term, 1862.]

This case is reported in Chancery, in 1 *McCarter* 78.

It was argued by *Jacob Weart*, for appellant, *ex parte*.

The decree of the Chancellor was reversed by the following vote:

For reversal—Judges BROWN, COMBS, ELMER, HAINES, KENNEDY, OGDEN, VAN DYKE, VREDENBURGH, WHELPLEY, WOOD—10.

For affirmance—None.

* The reporter regrets that he has been unable (after a diligent search) to obtain the very elaborate opinion which was prepared by Chief Justice Whelpley, and read by him in pronouncing the judgment of the court in this case.

Between THE GERMAN EVANGELICAL DUTCH CHURCH OF NEWARK, appellants, and SETH W. MAGIE, respondent.

[Decided at March Term, 1862.]

This case is reported in Chancery, in 2 *Beasley* 77.

C. Parker, for appellant.

Runyon, for respondent.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges BROWN, COMBS, CORNELISON, ELMER, HAINES, KENNEDY, OGDEN, VREDENBURGH, WHELPLEY, WOOD—10.

For reversal—Judge VAN DYKE—1.

Between ROBERT K. KILLE, appellant, and JOSEPH H. CAMPION, respondent.

[Decided at November Term, 1862.]

This case is reported in Chancery in 1 *McCarter* 229.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges BROWN, COMBS, CORNELISON, ELMER, HAINES, OGDEN, SWAIN, VREDENBURGH, WHELPLEY, WOOD—10.

For reversal—Judge KENNEDY—1.

Between MARY HILLYER, appellant, and JESSE F. SCHENCK, respondent.

This was an appeal *from the decree of the Ordinary.* See *ante*, page 398.

The court, at November term, 1862, made the following order in this case, without a division:

"It is ordered that this cause be dismissed from the files of this court, with costs, for want of jurisdiction by this court of the case."

Between WILLIAM R. KAIGHN, appellant, and MARIA M. FULLER, respondent.

[Decided at March Term, 1863.]

This case is reported in Chancery, in 1 *McCarter* 418.

The decree of the Chancellor was affirmed by the following vote (the court being equally divided):

For affirmance—Judges BROWN, COMBS, VREDENBURGH, WHELPLEY, WOOD—5.

For reversal—Judges CORNELISON, HAINES, OGDEN, FORT, SWAIN—5.

In this case Chief Justice WHELPLEY read an opinion for affirmance, and Judge OGDEN read an opinion for a reversal.

Between DAVID S. MANNERS, appellant, and PETER BENTLEY, respondent.

[Decided at March Term, 1863.]

Opinion, by Justice ELMER, for affirmance.

The decree of the Chancellor was affirmed unanimously.

Between JONATHAN F. MUIR, appellant, and THE NEWARK SAVINGS INSTITUTION and ALFRED B. BUTLER, respondents.

[Decided at June Term, 1863.]

Zabriskie, for appellant.

Hubbell and *Parker*, for respondents.

Opinion delivered by Justice ELMER.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges BROWN, COMBS, CORNELISON, ELMER, FORT, HAINES, KENNEDY, OGDEN, VREDENBURGH, WALES, WOOD—11.

For reversal—None.

Between FREDERICK W. WALKER, appellant, and JAMES C. ATWATER, respondent.

[Decided at November Term, 1863.]

Bradley, for appellant.

Zabriskie, for respondent.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges COMBS, CORNELISON, FORT, HAINES, OGDEN, VAN DYKE, VREDENBURGH, WHELPLEY, WALES, WOOD—10.

For reversal—None.

Between WRIGHT F. CONGAR, appellant, and FRANCIS DAVIS and others, respondents.

[Decided at November Term, 1863.]

McDonald, for appellant.

Keasbey, for respondents.

The decree of the Chancellor was affirmed by the following vote:

For affirmance—Judges COMBS, CORNELISON, ELMER, FORT, HAINES, KENNEDY, OGDEN, VAN DYKE, VREDENBURGH, WHELPLEY, WOOD—11.

For reversal—None.

HIRAM VAN DUYNE, appellant, and JAMES M. VAN DUYNE, respondent.

[Decided at November Term, 1863.]

This case is reported in Chancery, in 1 *McCarter* 397.

The court having in that cause decreed, among other things, that the appellant was "not entitled to the use of, or any title, interest, or estate in the lands mentioned and described in the second and third clauses of the said will of Martin J. Van Duyne, or in any part thereof, by virtue of any devise made to him, or to or for his use, in and by the said second or third clause of said will."

The appellant appealed from that part of the Chancellor's decree.

Vanatta, for appellant.

Chandler and *Bradley*, for respondent.

The part of the Chancellor's decree appealed from was reversed by the following vote:

For affirmance—Judges ELMER and VREDENBURGH—2.

For reversal—Judges CORNELISON, FORT, HAINES, KENNEDY, OGDEN, VAN DYKE, WHELPLEY—7.

APPENDIX,

CONTAINING

RULES OF THE COURT OF CHANCERY

OF THE

STATE OF NEW JERSEY,

AS REVISED BY THE CHANCELLOR; TOGETHER WITH THE RULES OF THE PREROGATIVE COURT. ALSO, A FURTHER SUPPLEMENT TO THE ACT ENTITLED, "AN ACT RESPECTING THE COURT OF CHANCERY," AND ADDITIONAL RULES, ADOPTED AT MARCH TERM, 1867.

INDEX

TO RULES OF THE COURT OF CHANCERY.

RULES OF THE PREROGATIVE COURT.

OFFICERS

OF THE

COURT OF CHANCERY, 1866.

ABRAHAM O. ZABRISKIE.....*Chancellor.*
BARKER GUMMERE.....*Clerk.*

TERMS OF THE COURT.

First Tuesday of February.
Third Tuesdays of May and October.

CONTENTS.

OFFICERS OF THE

PREROGATIVE COURT.

ABRAHAM O. ZABRISKIE, *Ordinary, Surrogate General, and Chancellor.*
HORACE N. CONGAR, *Register.*

TERMS OF THE COURT.

FIRST TUESDAY OF FEBRUARY.
THIRD TUESDAYS OF MAY AND OCTOBER.

OFFICERS OF THE

COURT OF ERRORS AND APPEALS,

1867.

ABRAHAM O. ZABRISKIE, *Chancellor*.....*President.*
MERCER BEASLEY.....*Chief Justice.*

LUCIUS Q. C. ELMER.....	*Justices of the Supreme Court.*
PETER VREDENBURGH.....	
JOSEPH D. BEDLE.....	
GEORGE S. WOODHULL.....	
VANCLEVE DALRIMPLE.....	
DAVID A. DEPUE.....	
GEORGE F. FORT.....	*Six Judges.*
ROBERT S. KENNEDY.....	
JOHN M. CORNELISON.....	
E. L. B. WALES.....	
JOHN CLEMENT.....	
GEORGE VAIL.....	

HORACE N. CONGAR.....*Clerk.*

TERMS OF THE COURT.

SECOND TUESDAY OF MARCH.
THIRD TUESDAYS OF JUNE AND NOVEMBER.

RULES OF THE COURT OF CHANCERY.

I...OF PLEADINGS.

1. All bills and answers, and other proceedings intended to be filed, shall be fairly and legibly written; and every bill shall be signed by counsel before it is filed.

2. No bill or other pleading shall recite records, deeds, or other documents in full, but only so much and such parts thereof as may be necessary for the clear exhibition of the case or the construction of the document, omitting all parts not relevant to the relief sought or the defence set up; and no pleading shall repeat documents or parts of documents set forth in any previous pleading, but if the same are not fully or accurately set forth, may add such parts as shall be necessary to complete or correct the same.

3. No foreclosure bill shall set forth the bond or mortgage at length, but only those parts thereof upon which the relief sought is founded, including the date, names of parties, consideration, words of conveyance, description of premises, the words limiting the estate, and the condition in full; and no costs shall be taxed or allowed for any bill drawn in palpable violation of this rule.

II...OF THE CLERK.

4. The clerk of the court shall, on or before the first day of January, annually, make out a statement of the funds in his hands, where the same are deposited, or how invested, and the times when the same was received, and the suit or matter in which the same was paid in, in order that the Chancellor may give such directions concerning the same as he may deem advisable.

5. That all moneys paid into the court shall be deposited forthwith in "the Trenton Banking Company," to the credit of "the Court of Chancery of the State of New Jersey," unless otherwise specially ordered by the court; and no moneys on deposit under this or any special order of the court shall be drawn, except by a draft or check of the clerk, endorsed by the Chancellor; and whenever any money is paid into court, it shall be the duty of the clerk, immediately upon the receipt thereof, to give notice of the same to the Chancellor.

6. The clerk of this court shall not practice, either as a solicitor or as a counsellor in the court.

7. No file of the court shall be suffered by the clerk to be taken out of his office, without the order of the court for that purpose previously obtained.

8. In future the clerk shall, in the copies of all pleadings, depositions, and other proceedings filed or remaining as of record in his office, made out by him to be used in this court, leave a margin of not less than one inch, and shall distinctly mark and set down in the margin the number of pages in the original pleadings, depositions, and other proceedings, so that the copy may correspond with the original in the paging thereof.

9. The solicitor, in every case in this court, shall be answerable to the officers thereof for all lawful fees which shall become due to them in the conducting the suit (execution fees excepted), and the clerk of the court is authorized to receive from the solicitors all such fees as shall become due to the Chancellor; and, in order to enforce the punctual payment thereof by the solicitors, the clerk shall forbear to enter, or suffer to be entered or filed in his office, any rule or rules, paper or papers, until the solicitor moving the same shall have paid up all fees due from him to the Chancellor, and also to the clerk himself, on the last day of the term next preceding the term in which such entry or filing is moved to be made.

10. In all causes where there are proceedings subsequent to a decree final, which shall alter or vary such decree, the same shall be enrolled by the clerk, but not otherwise.

11. The clerk shall in no case issue execution for costs allowed by any order of the court, unless by the order of the court.

12. The clerk of this court shall keep in his office a docket, in which he shall enter the titles of all suits brought in the court, and a memorandum of every paper filed in the same, under the title of the suit, with the time of filing and the name of the solicitor of each party, and also an alphabetical index to the same; and the said docket shall be, at all proper hours, accessible to the bar.

III...OF MASTERS AND EXAMINERS.

13. Every person who shall be appointed a master or examiner of this court shall, before he enters upon the execution of his office, subscribe and take, before the Chancellor or clerk, an oath or affirmation impartially and justly to perform all the duties of the office, according to the best of his abilities and understanding.

14. When a matter is referred to a master of the court to examine and report upon, he shall, if notice be necessary, assign a day and place to hear the parties; and the party obtaining the reference, or who shall be ordered to procure the master's report, shall serve the adverse party, at least four days exclusive before the day assigned for the hearing, with a summons, issued by the master, requiring his attendance at such time and place, and make proof thereof to the master; and thereupon, if the party summoned shall not appear, or good cause shall not be shown why he does not, the master may proceed *ex parte;* and if the party serving the summons shall not appear at the time and place, or show cause why he does not, the master may either proceed *ex parte*, or the party obtaining the summons, and not appearing, shall lose the benefit of the reference, at the election of the other party.

15. When, by a decretal order of the court, any inquiry before a master is directed to be made in a cause, and the examination of witnesses shall be necessary to obtain the proper information, such examination, if required by either party, shall, at the expense of the party requiring it, be reduced to writing by the master, in the form of depositions, and returned and filed with the report.

16. That all references in divorce and partition, and in applications for sales of lands of infants, idiots, lunatics, and habitual drunkards, shall be made to a "special master."

IV...OF PROCESS.

17. The names of all the defendants in the same cause shall be inserted in one subpœna, unless the defendants reside in different counties, in which case the names of all those who reside in the same county shall be inserted in the same subpœna.

18. Copies of tickets served with the subpœna upon defendants shall be annexed to, and returned with the subpœna.

19. Every execution issued shall be directed to a sheriff, unless the Chancellor shall, for reasons presented to him, otherwise order.

V...OF AFFIDAVITS.

20. A copy of every affidavit intended to be used on the argument of any special motion, or of any other special matter before the court of which notice shall be necessary, shall be served on the adverse party at least four days before the day of argument, or shall be taken on two days' notice, at least, of the time and place of taking the same; and all affidavits made use of in court shall be first filed with the clerk; and no writ, order, or other proceeding, grounded upon an affidavit or affidavits, shall be issued, filed, or entered by the clerk, unless the affidavit or affidavits upon which it shall be grounded shall have been previously filed.

21. Affidavits and petitions, duly sworn to, on which rules to show cause may be granted, if served as affidavits, may be used on the hearing of the rule to show cause.

VI...OF ABSENT DEFENDANTS.

22. In all suits against an absent defendant, an order may be had that said defendant appear, plead, answer, or demur to the complainant's bill in two months from the date of the order, unless the Chancellor, for special reasons, shall otherwise direct.

23. In cases where husband and wife are made defendants,

and he only is served with process of subpœna, the wife being out of the state, an order of publication shall be taken against her, unless an appearance be entered for her.

VII. OF ATTACHMENT FOR CONTEMPT.

24. All attachments for contempt shall have at least fifteen days, exclusive, between the *teste* and return, unless the Chancellor, upon motion or petition, shall order otherwise; and all the defendants in the same cause and in the same county shall be named in the same writ of attachment.

25. When an attachment for a contempt shall be served, the defendant shall be retained in custody thereon, to answer the exigency of the writ, until the return day thereof, unless he shall, with one sufficient surety at least, give bond, in the penal sum of five hundred dollars to the complainant, conditioned for his appearance on the return day of the attachment, according to the command of such writ, and that he will not depart thence without leave of the court.

26. When a defendant in attachment shall have given bond for his appearance, he shall enter his appearance with the clerk on the return day of the writ, and give notice thereof to the adverse party.

27. The plaintiff shall, within eight days after such notice, enter a rule of course for the defendant's examination upon interrogatories touching his contempt, before one of the masters of this court, and serve a copy thereof, with a copy of the interrogatories, on the defendant in attachment, or on his solicitor; and in case of his neglect so to do, the court may order the party to be discharged from the attachment with costs.

28. When the party attached shall attend before the master upon the interrogatories, if any questions arise in respect to the interrogatories, they shall be settled by the master, and the party attached shall, within four days after they are submitted to or settled, as aforesaid, put in his examination in writing; and the master shall, if required by the adverse party so to do, report, with the interrogatories and examination, whether, in his opinion, the examination is full and satisfactory or not.

VIII...OF INFANT DEFENDANTS AND SUITS ON MORTGAGES.

29. For the purpose of having a guardian appointed for an infant to answer and defend a suit, a petition may be presented by the infant, if above the age of fourteen years, or if under that age, by his father, or some other friend in his behalf, praying such appointment; which petition shall be accompanied with an agreement expressing the assent of the person petitioned for to accept of the appointment, and also with an affidavit or affidavits that the petition and agreement were duly signed, and verifying the age of the infant.

30. When a bill is filed against an infant, or when, upon an abatement, any infant shall, by order of the court, be made defendant, and no application shall be made on his behalf, within four days next after the day of appearance specified in the subpœna or order of publication, for the appointment of a guardian, the Chancellor may, on an application on behalf of the complainant, assign a guardian for the infant, the same as if he had been brought into court for that purpose, or make such other order touching the same as may appear most proper and advisible; but fifteen days' notice of such application must be given to the infant, if of the age of fourteen years and resident within this state, or, if under that age, or not resident in this state, to his guardian, appointed by the Orphans Court, if any there be, and if no such guardian, to the father of such infant, or if no father, then to the mother; provided such guardian, father, or mother be resident within this state; which notice may be served at the time of the service of the subpœna or at any time after.

31. In suits for the satisfaction of a mortgage, when an application shall be made for the appointment of a guardian for an infant defendant, as provided for in the last preceding rule, or when it shall appear by affidavit, to the satisfaction of the Chancellor, that notice cannot be served, as mentioned in that rule, the Chancellor may, on the application of the complainant, appoint the clerk of the court guardian *ad litem* for such infant, whose duty it shall be, if no application

shall be made on behalf of the infant for the appointment of a guardian within the time allowed by law for such infant to answer, plead, or demur to the bill, to enter an appearance for the infant to the suit; after which the complainant may, if the suit is against the infant alone, or the bill shall have been ordered to be taken *pro confesso* against the other defendant or defendants, or upon filing of the consent in writing of such other defendant or defendants, or his or their solicitor therefor, take an order to refer the cause to a master to ascertain the truth of the allegations of the complainant's bill, and to take an account of what is due upon the complainant's mortgage (if anything), and also upon any other encumbrance which it may be necessary to ascertain the amount of, and if more encumbrances than one, to report their several priorities; and the complainant and every other person setting up an encumbrance before the master, affecting the estate or interest of such infant, shall prove his demand before the master; and the master may, if he thinks proper so to do, examine the complainant, or other person setting up such demand, on oath or affirmation, to ascertain the truth thereof, and shall report the proof to the court, and also such examination, if any, and shall also inquire and report whether, under the circumstances of the case, a sale of the whole, or a part only, of the mortgaged premises is necessary to be made, and any other special matter which the master may deem proper for the benefit of the infant; and, if no exception to said master's report shall be filed within four days after the filing of said report, the complainant shall, without further notice or setting down such cause for hearing, be entitled to a final decree.

32. In any suit for the foreclosure and sale of mortgaged premises, in which an appearance shall have been entered by any defendant, and no plea, answer, or demurrer shall have been filed, an execution may issue after the final decree shall have been on file two months, unless the defendant shall enter an order within the said two months, which shall be a rule of course extending the time for issuing the same to a period not more than one month from that date; provided nothing in this rule shall restrain the issuing such execution for more

than six months from the return of the process to answer in such suit.

33. No order in the proceedings for foreclosure and sale under mortgages shall be filed by the clerk until it is actually signed, and no order shall be filed *nunc pro tunc* without a special order for the purpose; and all proceedings under an order not actually signed shall be null and void.

34. In foreclosure suits, no decree shall be made for the payment of the deficiency of the proceeds of sale to satisfy the mortgage debt, by any defendant legally or equitably liable therefor, unless such decree be specifically prayed in the bill, and a ticket or notice, stating that such relief is sought against him, be served on such defendant, with the subpœna, or in case of absent defendants served with the order to appear, or if the order be advertised, mailed with a copy of such order prepaid, directed to such defendant, at the post-office nearest his residence, or at which he usually receives his letters, or be served or published in such manner as the Chancellor shall direct.

35. And on any execution issued for such deficiency against several defendants, some liable after the others, the order in which they are liable, as between themselves, shall be endorsed; and if paid by a defendant secondarily liable, he shall have the right to use the decree and execution to compel the payment by parties liable before him.

IX...OF INJUNCTIONS.

36. In the absence of the Chancellor from the city of Trenton, a petition addressed to him for an injunction may be presented to such master of this court, residing at the city of Trenton, as the Chancellor shall for that purpose by order designate, and the master shall exercise the power of reporting upon the propriety of issuing the injunction prayed for; and in case the master shall report that an injunction ought to issue, it shall be issued by the clerk, on filing with him the said petition and report; but the defendant may, on eight days' notice, move the Chancellor for the dissolution of the said injunction.

37. Where an application is made for an injunction, and

the Chancellor directs an order to be entered requiring the defendants to show cause, on a particular day, why the injunction should not be granted, it shall be the duty of the complainant to serve such order on the defendant, together with a copy of the bill and affidavits annexed, at least six days previous to the day fixed for the hearing, unless the order shall otherwise direct; such order shall specify the manner of service, and on which of the defendants, if there shall be more than one: and on the hearing of such motion the defendant may read his answer to the bill, and also affidavits in reply to affidavits annexed to the bill; but no other affidavits shall be read on either side, unless, for special reasons, the Chancellor, on application at the time appointed for the hearing, shall by order otherwise direct: and when further affidavits are taken, under an order for the purpose, they shall be taken on two days' notice to the opposite party.

38. No motion to dissolve an injunction before answer shall be entertained, except on the ground of want of equity in the bill, unless the defendant shall show good cause why an answer hath not been put in; and where no answer has been put in, and the Chancellor shall allow the motion to be heard on affidavits on the part of the defendant, the adverse party shall be permitted to rebut them by counter affidavits; but such affidavits, on both sides, shall be taken on two days' notice.

39. Where a motion is made to dissolve an injunction upon the answer, the defendant shall rely on his answer, and on the affidavits annexed thereto in reply to affidavits annexed to the bill; and no affidavits, except those annexed to the bill, shall be read on such motion on behalf of the complainants, except in reply to new matter set up in the answer, and upon which the defendant shall in any manner rely for a dissolution of the injunction.

40. Whenever a cause shall be at issue in any court of common law, no injunction shall issue before answer filed to stay the trial of the cause, unless applied for and actually taken out twenty days previous to the sitting of the court in the county in which the trial is to be had, except some special cause shall be shown to the Chancellor or to the master

authorized to report upon the propriety of issuing the injunction prayed for, and it shall be made to appear that the injunction is applied for within a reasonable time after the complainant became apprised of the circumstances on which his application is founded; and whenever an injunction shall be granted to stay proceedings at law within twenty days previous to the sitting of the court as aforesaid, it shall be upon condition that the party pay the costs at law of the term at which the cause was noticed which have accrued up to the time of the service of the injunction.

41. No injunction shall be allowed to stay the proceedings in an ejectment suit, after issue joined thereon, unless the complainant shall give a bond, with sufficient sureties, in the penalty of at least double the rent of the premises for two years, if the premises are leased at a fixed rent, or if not leased, then in such sum as the Chancellor or master shall direct, conditioned for the payment to the party against whom such injunction is granted of all such damages and costs as may be awarded to him, either at law or in this court, in case of a decision against the party obtaining such injunction.

42. In cases where an injunction is granted *ex parte*, the Chancellor or master may, at his discretion, take from the complainant a bond to the party enjoined, in such sum as may be deemed sufficient, either with or without sureties, conditioned to pay to the party enjoined such damages as he may sustain by reason of the injunction, if the court shall eventually decide that the complainant was not equitably entitled to such injunction, such damages to be ascertained in such manner as the Chancellor shall direct.

43. No injunction shall issue after answer filed, without giving eight days' notice of the application therefor, unless it shall be made to appear to the Chancellor or master that the circumstances of the case are such as to make it proper to dispense with such notice.

44. In all cases where an application is made for an injunction to the Chancellor or to a master, and the same is denied, an endorsement of the denial shall be made on the bill or petition, and the said bill or petition shall be put on the files of the court.

45. Where a writ of injunction has been issued, it shall be served within twenty days after the issuing thereof; and a return of service shall be made to the court within ten days after such service, and on failure thereof, the defendant shall be entitled to a dissolution of the injunction, unless the Chancellor shall, by order, give further time for the service and return of the writ.

46. In a bill where an injunction is prayed, and the facts which are relied upon for the injunction are not within the knowledge of the complainant, such facts shall be verified by the oath or affirmation of some person who has a knowledge of the facts, unless, under the peculiar circumstances of the case, the Chancellor shall dispense with such additional verification.

47. No injunction shall be allowed against an incorporated company, or against any individual, the effect of which is to stay the progress of any public work authorized by any law of this state, without an order first made to show cause, as provided in rule 37; and this rule shall not be dispensed with in any case, except by the order of the Chancellor first obtained and filed, unless such injunction be granted by the Chancellor himself.

X...OF AMENDMENTS.

48. The complainant may amend his bill of course, and without motion or rule, at any time before answer, plea, or demurrer filed, and without costs.

49. If the defendant put in an insufficient answer, which is excepted to as insufficient, and the defendant submits to answer further, or the answer shall, on reference, be reported insufficient, in either case the complainant may amend his bill of course, and without costs, and the defendant shall answer the amended bill and exceptions together; and if the defendant shall plead or demur, and the plea or demurrer shall be overruled, the complainant may, before filing an answer, amend his bill of course, and without costs.

50. In all cases not before mentioned, in which the defendant shall have answered the complainant's bill, and the complainant shall obtain leave to amend, if such amendment

require a new or further answer, then the complainant shall pay costs, to be taxed.

51. In all cases where the defendant's appearance has been entered, and he hath procured a copy of the bill, and the complainant is allowed to amend without costs, he shall furnish the defendant with a certified copy of the amended bill, or amend the defendant's copy gratis.

52. If the defendant demur to the bill for want of parties, or other defect which does not go to the equity of the whole bill, the complainant may amend of course at any time before the next term after filing the demurrer, upon payment of costs, to be taxed.

53. When a complainant shall amend his bill, which has been sworn to, no interlineation, erasure, or other alteration shall be made in the original bill on file; but the amended bill shall be engrossed anew, sworn to, and filed, and annexed to the original bill, unless the court shall otherwise order.

XI...OF EXCEPTIONS.

54. When a complainant shall take exceptions to an answer for impertinence or scandal, he may, at the same time, except to the answer for insufficiency; and all exceptions to an answer for impertinence, scandal, or insufficiency shall be referred, by one rule, to the same master; and after a reference of the answer for impertinence or scandal, the complainant shall not be allowed to refer the answer for insufficiency; nor after a reference for insufficiency, shall there be a reference of the same answer for impertinence or scandal.

55. A rule of course to refer exceptions to an answer for insufficiency shall not be entered until six days after service of a copy of the exceptions on the defendant or his solicitor; and if the defendant shall, within that time, submit to answer the exceptions, he shall give notice thereof to the complainant's solicitor, and pay the costs of the exceptions; and in that case, if the complainant shall, within six days after such notice, or within such further time as the court shall allow, amend his bill and the defendant's copy, the defendant shall answer the exceptions and amendments at the same time.

56. When a defendant shall have given notice that he submits to answer the exceptions, he shall file a second or further answer within twenty days after the complainant has amended his bill and the defendant's copy; or if the complainant shall not amend his bill, then, within twenty days after receiving a copy of the exceptions; or on failure thereof, the complainant's bill shall be taken as confessed, and such proceedings had thereon as if the first or original answer had not been filed.

57. When an answer shall be excepted to for insufficiency and for impertinence and scandal, or for insufficiency and impertinence or scandal, if the defendant submits to answer the exceptions for insufficiency, but does not at the same time give notice that he consents to have the parts of the answer excepted to for impertinence or scandal expunged, the complainant may immediately and of course enter a rule to refer the exceptions for impertinence or scandal to a master.

58. Exceptions to any pleading, or other matter pending before the court for scandal or impertinence, shall be taken in the same manner as exceptions to an answer for insufficiency, and may be submitted to in like manner, and within the same time. If they are not submitted to, the party excepting shall refer them in the same manner, or they shall be considered as abandoned.

XII...OF INTERROGATORIES.

59. If the defendant intend to exhibit interrogatories to the complainant, he shall file the same, and serve a copy thereof within fifteen days after filing his answer, and not after, without leave of the Chancellor; and the complainant shall answer the said interrogatories within thirty days after service thereof, unless the Chancellor shall allow further time for answering the same: and if the complainant except to the interrogatories, he shall file his exceptions within ten days after service of the interrogatories, and enter a rule of course with the clerk to refer them to a master, who shall decide and report thereon within fifteen days after they are filed; but an appeal from such report shall be allowed to the Chancellor, if taken within ten days after filing the master's

report, and the Chancellor, whether in term time or vacation upon ten days' notice given by either party, shall hear and determine the same; and if the said exceptions be overruled, the complainant shall pay costs to the defendant; but if any of the said interrogatories shall be adjudged to be improper, the defendant shall pay costs to the complainant.

XIII...OF EXAMINATIONS.

60. That when any cause shall be at issue, and the interrogatories exhibited to the complainant, if any, answered, each party, the complainant first, and then the defendant, shall proceed to take and complete the testimony on his part before an examiner, by sessions continued from day to day, on proper notice of the time and place of commencing the same.

61. The complainant shall commence taking testimony on his part within thirty days after issue joined, and shall conclude the same in thirty days, and declare to the examiner when the testimony on his part is concluded.

62. Within fifteen days after the testimony on part of the complainant is declared to be concluded, or after the time for taking the same has expired, if no such declaration has been made, the defendant shall commence taking testimony on his part, if any he has, and shall conclude the same in thirty days, and declare when the same is concluded.

63. The examiner may, at the request of the party taking testimony, adjourn to any day within said thirty days to any place within the county: and any examiner may take such testimony, or any part thereof, in place of the examiner before whom the same was noticed or commenced; but only one examination shall proceed in the same cause at the same time, except on commission by interrogatories.

64. When the defendant shall declare the testimony on his part closed, or when the thirty days for taking testimony on his part shall have expired, the complainant may proceed immediately, or by adjournment, not exceeding ten days, with testimony to rebut the testimony of the defendant, or to sustain testimony on his part, impeached or contradicted by the defendant, and the defendant may afterwards produce

counter rebutting evidence on his part; but such evidence shall not be continued for more than five days on each side.

65. The examiner may, at the request of either party, adjourn the examination to a day within the time limited to said party, giving precedence to the request of the party then proceeding with taking testimony; and when such adjournment is regularly made at the time and place at or to which an examination was noticed or adjourned, no notice of the same need be given.

66. If either party cannot complete his testimony within such thirty days his time may be enlarged upon motion, on notice served before the expiration of said time, for reasons verified by proof satisfactory to the Chancellor.

67. The time for taking testimony above limited shall not be extended, except by written consent or by order of the court, made upon notice.

68. No legal holiday, except Sunday, nor any day between the fifteenth day of July and the first day of September, unless occupied in taking testimony, shall be computed as part of said limited time.

69. Every cause shall be noticed for hearing at the next term after the evidence therein is closed, provided there shall be sufficient time to notice it at or in such term, and no cause shall be set down for hearing on any day in term after the twentieth day.

70. The exhibits offered in any cause, except books of account in actual use, shall, upon request, be left with the examiner for such reasonable time as he may prescribe, that the same may be examined by the other parties, and copies made by the examiner, unless the party producing them will furnish such copies, and then they may be inspected, as directed by the examiner, in the presence and custody of the party producing them; and there shall be paid for such copies, when made by the master, ten cents per folio, and when made by the party, four cents per folio, which shall be allowed and taxed as costs in the cause.

71. All depositions of witnesses before examiners shall be taken down in the first person, as spoken by the witness, and, as near as practicable, in the words of the witness.

72. When issue shall be joined on a plea, the defendant shall begin taking testimony, and the same shall then proceed in the manner above directed; but the times for commencing and taking the same by each party shall be one-third of the times prescribed in the above rules.

73. It shall be the duty of the examiners of this court to transmit, without any unnecessary delay, all depositions and examinations of witnesses by them taken in any cause pending in this court to the clerk of the court to be filed; and all depositions and examinations of witnesses taken in a cause by an examiner shall be filed in the clerk's office within ten days after the examination of witnesses in the cause shall be closed: and no examination shall be filed after the expiration of the said ten days, without an order of the Chancellor directing the filing thereof.

74. In order to compel the attendance of witnesses who reside in the state before the examiners of the court, for the purpose of giving evidence in a cause depending in the court, a subpœna may be issued by the clerk, upon request of any complainant or defendant, or his solicitor, with a blank for the names of the witnesses, to be filled up by the party procuring the same, as occasion may require, commanding the attendance of the witnesses before the examiner therein named, at the time and place therein expressed; and the names of any number of witnesses may be inserted in the same subpœna.

75. When a cause is at issue, a commission for the examination of a witness out of this state may be applied for, either in vacation or in term time, upon affidavit stating that the witness is material, and that the party applying cannot safely proceed to a hearing of the cause without his testimony; and upon giving five days' notice of the intended application, with the name or names of the witnesses, their residence, and the name or names, additions, and residences of such person or persons as the party applying intends to nominate as commissioner or commissioners.

76. If the party to whom notice is so given intend to join in the commission, and to name any other commissioner or commissioners, he shall give notice to the adverse party two

days before the intended application, of the name or names, additions, and residence of the person or persons whom he proposes for a commissioner or commissioners; and the Chancellor shall appoint the commissioner or commissioners to execute the commission: and the party who shall first give notice of his intention to move for the commission shall sue out and forward the same; but if he shall unreasonably delay so to do, the other party may forward, and cause it to be executed and returned; and every order for a commission shall fix a time for its return, and it shall not be used if not returned within said time, unless the time be extended by an order for that purpose.

77. The name of every witness to be examined by virtue of such commission shall be inserted therein, and the interrogatories to be administered to the witnesses annexed to the commission; and copies of the interrogatories shall be furnished to the opposite party, that is to say, copies of all direct interrogatories shall be furnished six days, and copies of the cross-interrogatories two days before the time of submitting the same to the Chancellor for his approval; and notice of the time and place of such submission shall be served with the interrogatories, at which time and place the cross-interrogatories shall also be submitted.

78. An order may be taken by any defendant, at any time before the expiration of the time to close his testimony, to examine a co-defendant as a witness, upon filing an affidavit that such defendant is a material witness, and is not interested in the matter to which he is to be examined; which order and examination shall be subject to all just exceptions which the adverse party may be at liberty to take at the hearing of the cause.

79. No documentary evidence, which is not made an exhibit before the master, shall be read at the hearing of the cause.

80. The examiner shall number each page of the examination taken by him, and also every tenth line of the same, leaving sufficient margin for the purpose; and where more than one witness is examined, he shall annex a separate leaf to the examination, containing a list of the names of the

witnesses, and a reference to the pages on which their examination respectively commences; and no costs shall be taxed for any examination where this rule has not been strictly complied with.

XIV...OF RULES AND ORDERS.

81. Every rule for a reference to a master of exceptions to a bill, answer, or to interrogatories to a complainant to be answered; every rule for setting down for argument a plea, demurrer, or exceptions to a master's report or a cause for hearing; every rule to confirm a master's report *nisi* or for an injunction, where a master, as aforesaid, shall report that it is proper for an injunction to issue, and all rules to which a party would, according to the practice of this court, be entitled of course without showing special cause, shall be denominated a common rule, and every other rule shall be denominated a special rule. All common rules, and all rules, whether common or special, by consent of parties, (such consent being in writing, and signed by the parties or their solicitor or counsel, and filed,) may be entered, either in term time or vacation, with the clerk of the court, in a book to be by him procured and kept for that purpose; but every common rule shall be considered as entered at the peril of the party at whose instance it is entered, and the day of entering thereof shall be noted in the said book.

82. All summonses to attend a master, orders to confirm reports, unless good cause shown, and all orders *nisi*, if made in any cause depending in court, shall be served on the solicitor of the adverse party, if a solicitor be concerned for him; but if no solicitor be concerned for him, the service may be on the party, or left at his usual place of residence, or, if not resident in this state, by setting up the same in the office of the clerk of this court.

83. In all suits for the foreclosure or satisfaction of a mortgage, where there are no defendants claiming to be encumbrancers when the complainant's bill shall be ordered to be taken as confessed, or the defendant shall make default at the hearing, and the whole amount of the debt intended to be secured by the mortgage shall have become due, no order

of reference to a master to ascertain and report the sum due to the complainant shall be necessary, unless specially ordered by the court; but a report by a master being made of the amount due upon the mortgage, the same, if no cause to the contrary be shown, shall be filed of course, and without any motion or rule for that purpose or for confirmation, and a decree made accordingly.

84. In cases where the complainant's bill shall be ordered to be taken *pro confesso* against a defendant, and there shall be a reference to a master ordered in the cause, the complainant may proceed before the master without notice thereof to such defendant, and it shall not be necessary, upon the coming in of the master's report, to enter a rule to confirm the same *nisi*, or to set the cause down preparatory to further directions, or to a final decree against such defendant; but, if no exceptions to said report be filed within four days after the filing of said report, the complainant shall, without further notice, be entitled to a final decree.

85. In all cases where the complainant's bill shall be taken *pro confesso* against the mortgagor, and other defendants claiming to be encumbrancers file their answer or answers setting up said encumbrances, if the order of priority shall not appear, upon the face of the pleadings, to be disputed by the parties, either complainant or defendant, and the amounts respectively claimed as due do not appear to be denied, and a report be made upon an order of reference to a master, it shall not be necessary to enter a rule *nisi* to confirm said report, or to set the cause down for hearing on the same; but if no exceptions to said report be filed within four days after the filing of said report, the complainant shall, without further notice, be entitled to a final decree.

86. Orders *nisi*, when necessary to confirm reports of masters, need not be served upon a defendant who has been notified to attend the master respecting the matter referred, and has refused or neglected to attend, but shall become absolute of course, unless cause be shown to the contrary.

87. In cases where the court shall order the complainant to produce documents and depositions, exhibits or other evidence, to substantiate and prove the allegations in his bill,

the proceedings subsequent to the said order may be considered as *ex parte*, and it shall not be necessary for the complainant to give notice thereof to the defendant.

88. Where a complainant omits to take a decree *pro confesso* within four months after the time when he is entitled to it against all the defendants, he shall not thereafter move such decree until he has first taken and served an order on the defendant or defendants, if in this state, to file their answer or answers at such short day as the court may appoint.

89. When the complainant in any bill filed to foreclose a mortgage makes prior or subsequent encumbrancers parties to said bill, and they come in and answer, and the complainant then for four months neglects or refuses to proceed, the said defendants, or any of them, may take an order upon the complainant to show cause at any time, on ten days' notice, why the said defendant or defendants shall not be allowed to proceed with the said cause to decree and execution in his name; and unless good cause be shown to the contrary, an order may be made that the said defendant or defendants shall be allowed so to proceed with the suit, and the complainant shall not be allowed his costs.

XV...OF SETTING DOWN CAUSES, ETC.

90. All causes, including pleas and demurrers, shall be set down for hearing for the first day of the term, provided there is time sufficient to give the notice required; if not time, then at a subsequent day in the term, not later than the twentieth day, and shall have priority according to the date of the issue; and the party setting down a cause for hearing, or his solicitor, shall, at least six days before the first day of the term for which the cause is noticed, furnish the clerk with a note of the time issue was joined, which shall be entered on the calendar; and in default thereof, the cause set down without such note shall lose its priority.

91. Notices of bringing causes to a hearing, including the bringing on the argument of a plea, demurrer, and of exceptions to a master's report, shall be served at least fifteen days before such intended hearing or argument.

92. Where the complainant has taken issue upon a plea,

by filing a replication thereto, either party may enter the plea for argument at the next or any subsequent term.

93. All suits for divorce shall be set down for hearing at or in the regular terms of the court.

94. When a replication has been filed, and the taking of proofs begun by either party, the complainant shall not be at liberty to dismiss his bill, except upon special motion and notice to the defendants; and in any such cause, if the complainant shall fail, within ten days after the expiration of the time to take testimony, to notice the cause for argument, the defendant shall be entitled of course to an order directing the complainant to show cause why the defendant should not be permitted to notice the cause for argument, and bring on the hearing thereof at the next stated term; and if cause be not shown to the contrary, the defendant may be permitted to give notice, and bring on the hearing of the cause.

95. If a suit be suffered to lie without prosecution for one year, it shall be considered as abandoned, and the bill may be dismissed.

XVI...OF THE ORDER OF BUSINESS.

96. On the morning of the first day of every stated term, motions and petitions shall have a preference of all causes set down for hearing or argument.

97. On all hearings and arguments before the court, after reading the pleadings, one of the counsel for the complainant, or party holding the affirmative, and having the right of opening, shall open the cause or matter in question, then two counsel for the adverse party may be heard in answer, after which one counsel, only, for the party having the opening may be heard in reply; but in case there be several defendants, who have separate and distinct interests, and different counsel concerned for them, then the counsel for the respective defendants shall be heard in such order as the court may direct, but in no case shall more than two counsel be heard for one defendant; and if any more than two counsel are heard in answer for the defendants, in that case two counsel may be heard in reply.

98. No other causes will be heard at a special term, ex-

cept such as are set down by consent of parties, unless otherwise specially ordered by the court.

99. Rules and orders to expedite a cause may be taken, as well in vacation as term time.

XVII...OF COSTS.

100. The clerk shall not tax costs for setting down any cause, plea, demurrer, or other matter for hearing or argument more than twice, unless when set down by a special order of the court.

101. If a party give notice of a motion, and does not move accordingly, he shall, upon the production of the notice, pay to the other side costs, to be taxed, unless the court, upon a consideration of the circumstances of the case, shall direct otherwise.

102. When a party shall set down a cause for hearing or argument, and give notice thereof, and shall not bring on the same agreeably to his notice, the opposite party, upon the production of the notice, shall be entitled to costs, to be taxed, for attendance on the court upon such notice, unless the court shall order off the hearing or argument without costs.

103. When the hearing or argument of a cause shall be ordered off upon the application of a party to whom notice has been given, the party setting down the cause shall be entitled to costs for attendance on the court upon such notice, to be taxed, unless the court shall order off the hearing or argument without costs.

104. A party shall not be allowed to tax costs against his adversary for any amendment, or for any motion occasioned by his own fault, mistake, or laches, though he may, by his decree, recover costs of suit; and when the court makes no special order respecting costs, a party making a successful motion, or successfully opposing a motion, shall have costs against the other party.

105. A counsel fee of three dollars shall be allowed for attending before a master or examiner making report or taking depositions, but no more, though the solicitor or counsel may have attended more than once, unless where new

notice was necessary, and shall have been given; and each party shall pay to the examiner the costs of his own examinations and cross-examinations.

106. In taxing costs in mortgage cases, no costs shall be allowed for any proceedings at law upon the bond or mortgage; but the clerk shall tax only such costs as have been incurred in the proceedings in this court.

107. In taxation of costs for service of subpœna to answer, the clerk shall allow for mileage only from and to the court-house of the county where the service is made.

108. For drawing and acknowledging every deed given by the guardian of an infant, idiot, or lunatic, by virtue of an order of the Chancellor, three dollars and fifty cents shall be taxed in the bill of costs.

XVIII...OF DECREES.

109. No final decree shall be enrolled by the clerk, or the enrollment signed by the Chancellor, nor any process issued thereon, until the expiration of ten days after pronouncing the same, without the special order of the court therefor.

XIX...OF REHEARING.

110. Every petition for a rehearing shall set out concisely the special matter or cause on which such rehearing is applied for, and shall be signed by two counsel, except in cases submitted without argument, when it shall be sufficient if signed by one counsel; and if a rehearing is ordered, the party that complains of the decree or order, and applies to have it corrected, shall be entitled to open and close the argument.

111. A copy of every petition for a rehearing shall be served on the opposite party, with a notice of presenting the same.

112. If a petition for rehearing shall be presented to the Chancellor within ten days after pronouncing any final decree, and a *caveat* against enrolling and signing the same shall be filed with the clerk of the court, such final decree shall not be enrolled and signed, or any process issued thereon, until the said application shall be finally disposed of.

113. The granting a rehearing shall not stay proceedings on any interlocutory decree or order, unless a special order be obtained for that purpose.

XX...OF APPEALS.

114. In case of an appeal from an order or interlocutory decree, the appeal shall not stay proceedings thereon without an order of this court or of the Court of Appeals for that purpose first had, and upon complying with such terms as the court making the order to stay proceedings may impose.

115. In case of an appeal from any final sentence or decree, if the party appealing shall, within ten days after such final sentence or decree, file his appeal with the clerk of this court, it shall prevent issuing process on the said decree, without the order of this court or of the Court of Appeals first had and obtained for that purpose.

116. The appeal to be filed shall state shortly the parts of the order or decree complained of as erroneous, and shall be signed by counsel, who shall state that he conceives there is good cause for the appeal; and a copy of the said appeal shall be served on the solicitor of the adverse party, if he has prosecuted or defended by a solicitor.

117. In case of filing an appeal, as aforesaid, from a final decree, the party appealing shall present his petition of appeal to the Court of Appeals, at their next term after pronouncing the said final decree, and on the first or second day thereof; and, in default of so doing, such appeal shall be deemed to have been waived, and proceedings may thereupon be had as if no appeal had been filed.

XXI...OF IDIOTS, LUNATICS, AND HABITUAL DRUNKARDS.

118. On all applications to obtain a commission of idiocy, lunacy, or habitual drunkenness, the petition shall be accompanied with the affidavits of two or more persons, evincing the lunacy, idiocy, or habitual drunkenness of the party against whom the commission is prayed, and the person's incapacity to manage his or her own affairs; and the commissioners and jury shall have a right to examine the person of

the idiot, lunatic, or habitual drunkard, and examine him or her before them, without a special order for that purpose.

119. In all cases where a commission of idiocy, lunacy, or habitual drunkenness shall issue, it shall be executed, and the inquisition returned to the Chancellor, in two months after making the order for issuing of the commission, or the commission shall be considered as superseded, and no proceedings take place thereon without the further order of the court; and no decree shall be entered up on any such inquisition, and signed, until the expiration of ten days after the inquisition shall be returned into the office.

XXII...OF GUARDIANS' SALES OF INFANTS' AND IDIOTS' OR LUNATICS' ESTATES.

120. The general guardian of the infant, if he have any, and if there is none, some relative or friend, may present a petition to the Chancellor, stating the age and residence of the infant, the situation and value of the real estate proposed to be sold, with a description of the same, and the particular reasons which render a sale of the premises necessary or proper, and praying that a guardian may be appointed to sell the same. The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given.

121. The security required on a sale of the real estate of an infant, idiot, or lunatic, shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, each of which sureties shall be worth the penalty of the bond over and above all debts, or a similar bond of the guardian only, secured by a mortgage on unencumbered real estate of the value of the penalty of such bond, not estimating the improvements thereon.

122. Upon the petition being presented to the court, if it satisfactorily appear that there is reasonable ground for the application, there shall be a reference to a master to ascertain and report whether the person proposed as guardian is a suitable and proper person for that purpose; what is the age of the infant, the actual value of the infant's interest in

the real estate proposed to be sold, the sufficiency of the sureties offered by the guardian, and whether each is worth double the value of the infant's interest in the real estate proposed to be sold over and above all debts; or whether the land proposed to be mortgaged by way of security is unencumbered, and of the requisite value, according to the second rule; and what should be the penalty of the guardian's bond, in conformity with the provisions of that rule, to be given to each infant. And if the master is not satisfied with the person nominated as guardian, or with the security proposed, he may name a suitable person as guardian, and state what further or other security should be given.

123. On the coming in of the report of the master, an order may be entered appointing a guardian for the purposes of the application, on his executing and filing with the clerk the requisite security, approved of, as to its form and manner of execution, by the master, signified by his certificate endorsed thereon.

124. When the requisite security shall be filed as aforesaid, an order shall be made referring it to a master, specially designated in the order by name, to ascertain the truth of the facts stated in the petition, and whether the interest of the infant requires that said real estate, or any part thereof, should be sold, and what part, and the particular reasons upon which his opinion is founded; and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold, and fixing a price below which it should not be sold, and to report whether, in his opinion, said premises will increase in value during the minority of said infant, and to what extent: and if there is any person entitled to dower, or other life estate in the premises, who is willing to join in the sale, the master shall ascertain the value of such life estate in the premises, on the principles of life annuities, to be calculated upon the basis of the table annexed hereto.

125. If any person entitled to dower or other life estate in the premises is willing to join in the sale, and release such

life estate, upon receiving in lieu thereof such sum in gross as shall be approved by the Chancellor, or upon having one-third of the net proceeds of such sale invested for her use, and such person shall sign and deliver to such guardian, before the sale, his or her agreement, and consent to join in such sale and release said estate, and receive such gross sum in lieu thereof, or, in case of dower, to accept, in lieu of her dower, the investment of one-third of the net proceeds of such sale, the interest thereof to be paid to her during her life, then such guardian shall sell said lands free from said dower or life estate.

126. And if any person entitled to dower or life estate shall have agreed to join in said sale, and accept such gross sum, then, upon such sale, it shall be referred to a master to ascertain and report the value of such dower or life estate, on the principles of life annuities, to be calculated on the basis of the table annexed hereto; and to ascertain and report the clear yearly income, above repairs and taxes, that such tenant for life could realize from the whole premises during his or her life; and from such yearly income to compute, by said table, the absolute value of such dower or life estate, and report the same; and to inquire into and report the condition, as to health, of such doweress or life tenant, and whether he or she has an average expectancy of life; and if not, what deduction should be made from such gross sum on account thereof.

127. In the order approving the sale, and directing a conveyance to be executed, may be embraced the directions and order of the Chancellor for the application and disposition of the proceeds of the sale, and for the investment of the surplus thereof.

128. Every guardian and receiver appointed by this court shall, within six months after his appointment, and every special guardian for the sale of an infant's estate shall, within six months after the order confirming a sale of the estate, or any part thereof, file, in the office of the clerk of this court, a just and true inventory, under oath, of the whole estate committed to his care or guardianship, and of the manner in which the funds under his care or control belong-

ing to the estate are invested, stating the income and profits of such estate, and the debts contracted, and expenditures made by him on account thereof. And he shall annually thereafter, so long as any part of the estate, or of the income or proceeds thereof, remains in his hands, or under his care or control, file in the said clerk's office an inventory and account, under oath, of his guardianship or trust, and of the amount remaining in his hands or invested by him, and of the manner in which the same is secured or invested.

129. It shall be the duty of the clerk, on the first day of every stated term of the court, to present to the Chancellor a list of all guardians and receivers, and of all persons who have received money for investment under any order of this court, who have neglected to comply with the duties prescribed by the next preceding rule for more than three months after the times limited for the performance thereof, to the end that the Chancellor may make such order respecting such delinquents as may be just. And the inventories and accounts of such guardians and receivers shall from time to time, in the discretion of the Chancellor, be referred to one of the masters of the court, who shall report, at the next term of the court after such reference, whether such accounts appear to have been correctly kept, and whether the funds are safely invested or secured. And the said master may summon such guardian or receiver to appear before him, and examine him under oath touching his account or inventory; and he may summon and examine other witnesses touching the matters submitted to him, if he shall see proper to do so.

130. It shall be the duty of the master specially designated for the purpose, in the month of January, in every year, to examine the inventories and accounts of guardians and receivers which have been filed with the clerk for the preceding year, and report to the court, at its next term, whether such accounts appear to have been correctly kept; whether there has been any waste or misapplication of the funds, and whether the same are properly and safely invested or secured, so far as he can ascertain the same from the examination of such accounts and inventories on file. If such

master find the account or inventory of any guardian or receiver erroneous or imperfect, or discovers or suspects that the property has been misapplied or wasted, or that the funds are unsafe or improperly invested, he shall summon the guardian or receiver to appear before him to correct the account or inventory, or to give such explanations, on oath, as may be deemed necessary. The master may also summon and examine witnesses on oath, if he shall deem it proper, in relation to such inventory or account or the situation of the funds.

131. *It is ordered*, that Joseph H. Hough be appointed the master designated by the preceding rule.

132. The guardian shall be entitled to receive on all sales of such infants' estates the following per centage:

1. On all sums not over one thousand dollars, three per cent. on the amount of sales.

2. If over one thousand dollars, and not exceeding three thousand dollars, two per cent. on such excess; and

3. If over three thousand dollars, one per cent. on such excess.

133. That all duties to be performed by a master under this rule, respecting guardians' sales of infants' and idiots' or lunatics' estates, shall be performed by the masters who are designated by the Chancellor as "special masters."

XXIII...OF PARTITION.

134. Where a bill is filed for partition, and a decree *pro confesso* is taken, there shall be a reference to a master to report as to the rights of the respective parties in the premises, and to ascertain and report whether, in his opinion, a partition of the land or real estate can be made without great prejudice to the owners of the same; which report shall be made to the Chancellor, at a time and place named in the order of reference, at which time and place any party interested may appear and make objections to the report; but no exceptions in writing shall be filed to the same. If the master report that a partition cannot be made without great prejudice to the owners of the same, and the report is confirmed, then an order shall be made directing a sale by a

master. If the master report that, in his opinion, a partition can be made without prejudice, etc., then the Chancellor shall appoint three persons, as commissioners, to make partition according to law: and all further proceedings, as to such sale or partition, shall be according to the practice of the court in like cases heretofore. In cases of sale, the master shall be allowed the same fees which are designated by the act, approved March 29th, 1855, entitled "a further supplement to the act entitled, an act for the more easy partition of lands held by coparceners, joint tenants, and tenants in common."

XXIV...OF CASES SUBMITTED.

135. Where cases are submitted to the Chancellor without argument, such submission shall be made by agreement in writing, signed by the solicitors of the respective parties, and shall be accompanied by briefs or notes of the points and cases upon which the said parties respectively rely.

136. In all cases submitted by the consent of parties without argument, a rehearing shall be granted of course, if either party is dissatisfied with the decree or order made in such case, and shall apply therefor within ten days after such decree or order shall be made.

XXV...OF TERMS OF COURTS.

137. Each regular term of the court shall continue, for the setting down of causes and arguments, until the twentieth day thereof, and for all other purposes until the next regular term; but no arguments or contested motions shall be heard between the sixteenth day of July and the first day of September, except in injunction cases, unless by consent or the special order of the Chancellor.

XXVI...OF EXECUTION.

138. That every sheriff shall make return of his execution, and pay to the clerk of this court any surplus in his hands within thirty days after sale, and no execution shall hereafter be directed to any sheriff while he shall be in default in either of the above respects; and any sheriff, who shall pay over to any defendant named on an execution any

money raised by him on the same, unless so directed by the writ, or by an order of the court afterwards made, shall have no allowance for the same.

XXVII...OF PRINTING EVIDENCE.

139. Parties may agree to print the evidence in any cause for the final hearing, or if they do not agree, either party may apply for an order that the same be printed at the joint expense of both parties; in both cases each party shall, in the first instance, pay a share of the cost of printing, in proportion to the length of his examinations, cross-examinations, and exhibits, and such payment shall be allowed in the taxation of costs. And either party may, at his own risk, cause the evidence to be printed, in which case the Chancellor shall make such order for payment of printing as he shall deem right on the determination of the suit; and all evidence shall be printed in the manner directed by the rules of the Court of Errors and Appeals for printing records therein.

XXVIII...OF ORDERS TO EXTEND TIME.

140. No order shall be made to extend the time for taking testimony, or for filing any pleading or other paper, except upon three days' notice, which shall be sufficient notice in such cases; the affidavits upon which such applications are founded shall be served for three days, but counter affidavits may be read without notice.

XXIX...OF APPOINTMENT OF TRUSTEES.

141. Applications to appoint or substitute trustees may be made by bill or petition, and when made by petition shall set forth the trust sufficiently to show who are interested in the same as *cestui que trusts*, vested or contingent, and as trustees; and notice shall be given to each person so interested of the time, place, and object of such application, by serving the same in person or at the residence for ten days before such application; and if the party reside out of the state, by mailing the same prepaid, directed to such party at his post-office address, so that the same would reach him, by the usual course of the mail, twenty days before such

time; and in case such party shall be an infant, such notice shall be served on his or her parent or guardian, or in such other manner as the Chancellor, on application, may direct.

XXX...OF NOTICES OF MOTIONS.

142. Notices of motions to dissolve injunctions shall be served eight days, of motions to extend time for filing pleadings and other papers three days, and of all other special motions five days; and such notices of said motions, respectively, shall be sufficient.

143. The foregoing rules shall be in force and take effect on the first day of July, eighteen hundred and sixty-six, and from that date all other and former rules of this court shall be abrogated.

LIST OF SPECIAL MASTERS.

144. The following masters, until the further order of the court, are designated as "special masters."

BERGEN...Richard R. Paulison, Manning M. Knapp, and William S. Banta.

HUDSON...Isaac W. Scudder, Washington B. Williams, Frederick B. Ogden, and Jonathan Dixon, jun.

PASSAIC...Aaron S. Pennington, John Hopper, and William Gledhill.

ESSEX...William K. McDonald, Joseph P. Bradley, Theodore Frelinghuysen, Algernon S. Hubbell, John R. Weeks, Amzi Dodd, Theodore Runyon, William S. Whitehead, and Staats S. Morris.

UNION...William F. Day, William J. Magie, Robert S. Green, and Thomas H. Shafer.

SUSSEX...David Thompson, Robert Hamilton, and John Linn.

MORRIS...Theodore Little, Jacob Vanatta, Alfred Mills, and Henry C. Pitney.

WARREN...Phineas B. Kennedy, Jehiel G. Shipman, and John M. Sherrerd.

HUNTERDON...Alexander Wurts, Bennet Van Syckel, and Abraham V. Van Fleet.

MERCER...James Wilson, Caleb S. Green, Andrew Dutcher,

Barker Gummere, Edward W. Scudder, Joseph H. Hough, and Augustus G. Richey.

SALEM...Andrew Sinnickson and Clement H. Sinnickson.

MIDDLESEX...William H. Leupp, Robert Adrain, and George C. Ludlow.

MONMOUTH...Aaron R. Throckmorton, Joel Parker, Henry S. Little, Philip J. Ryall, and Amzi C. McLean.

SOMERSET...Hugh M. Gaston, John V. Voorhees, and Isaiah N. Dilts.

BURLINGTON...John C. Ten Eyck, Garrit S. Cannon, John L. N. Stratton, Frederick Voorhees, and Ewan Merritt.

CAMDEN...Thomas P. Carpenter, James B. Dayton, Charles P. Stratton, Samuel H. Grey, and Peter L. Voorhees.

CUMBERLAND...John T. Nixon and Charles E. Elmer.

GLOUCESTER...John C. Smallwood.

TABLE showing the present value of $1 per annum, to be received during the life of a person whose age is given; also, showing the widow's per centage of the net proceeds arising from the sale of land in which she is entitled to dower, her age at the time of the sale being given.—Calculated by the Carlisle Table of Mortality, and interest at 6 per cent.

AGE.	Present value of $1 per annum.	Widow's per centage of sale.	AGE.	Present value of $1 per annum.	Widow's per centage of sale.	AGE.	Present value of $1 per annum.	Widow's per centage of sale.
15	$14.126	$28.252	44	$11.551	$23.102	73	$5.170	$10.340
16	14.067	28.134	45	11.428	22.856	74	4.944	9.888
17	14.012	28.024	46	11.296	22.592	75	4.760	9.520
18	13.956	27.912	47	11.154	22.308	76	4.579	9.158
19	13.897	27.794	48	10.998	21.996	77	4.410	8.820
20	13.835	27.670	49	10.823	21.646	78	4.238	8.476
21	13.769	27.538	50	10.631	21.262	79	4.040	8.080
22	13.697	27.394	51	10.422	20.844	80	3.858	7.716
23	13.621	27.242	52	10.208	20.416	81	3.656	7.312
24	13.541	27.082	53	9.988	19.976	82	3.474	6.948
25	13.456	26.912	54	9.761	19.522	83	3.286	6.572
26	13.368	26.736	55	9.524	19.048	84	3.102	6.204
27	13.275	26.550	56	9.280	18.560	85	2.909	5.818
28	13.182	26.364	57	9.027	18.054	86	2.739	5.478
29	13.096	26.192	58	8.772	17.544	87	2.599	5.198
30	13.020	26.040	59	8.529	17.058	88	2.515	5.030
31	12.942	25.884	60	8.304	16.608	89	2.417	4.834
32	12.860	25.720	61	8.108	16.216	90	2.266	4.532
33	12.771	25.542	62	7.913	15.826	91	2.248	4.496
34	12.675	25.350	63	7.714	15.428	92	2.337	4.674
35	12.573	25.146	64	7.502	15.004	93	2.440	4.880
36	12.465	24.930	65	7.281	14.562	94	2.492	4.984
37	12.354	24.708	66	7.049	14.098	95	2.522	5.044
38	12.239	24.478	67	6.803	13.606	96	2.486	4.972
39	12.120	24.240	68	6.546	13.092	97	2.368	4.736
40	12.002	24.004	69	6.277	12.554	98	2.227	4.454
41	11.890	23.780	70	5.998	11.996	99	2.004	4.008
42	11.779	23.558	71	5.704	11.408	100	1.596	3.192
43	11.668	23.336	72	5.424	10.848	101	1.175	2.350

☞ The foregoing table was prepared by JOSEPH P. BRADLEY, esq. counsellor at law, at the request of the Chancellor.

RULES OF THE PREROGATIVE COURT.

I...OF PROCTORS.

All solicitors of the Court of Chancery shall be proctors of this court.

II...OF APPEALS.

On appeal to the Prerogative Court, from the order, sentence, or decree of the Orphans Court, or from the proceedings of a surrogate, the proceedings shall be conducted by proctor and counsel, and by guardians *ad litem* of minors, according to the practice of the Court of Chancery, except as herein after specified. The party appealing shall cause the transcript of all the proceedings before the surrogate or Orphans Court to be made, authenticated, and returned to this court within twenty days from the time of entering the appeal in the court below, or the Ordinary may dismiss the appeal, unless further time is allowed for the return of the transcript. The appellant shall also file a petition of appeal, addressed to this court, with the register, within fifteen days after the appeal is entered in the court below, or the appeal shall be considered as waived; and any party interested in the proceedings in the court below may thereupon apply to the Ordinary *ex parte* to dismiss the appeal with costs. The petition of appeal shall briefly state the general nature of the proceedings in the court below, and of the sentence, order, or decree appealed from, and shall specify the part or parts thereof complained of as erroneous; except where the whole sentence, order, or decree is alleged to be erroneous, in which case it shall be sufficient to state that the same, and every part thereof, is erroneous. And where the appeal is from the sentence or decree of an Orphans Court, on the settlement of the accounts of an executor, administrator, or guardian, if the appellant wishes to review the decision of

the Orphans Court, as to the allowance or rejection of any particular items of the account, such items shall be specified in the petition of appeal, or the allowance or disallowance of any such items shall not be considered a sufficient ground for reversing or modifying the sentence or decree appealed from. The respondent, in his answer to the petition of appeal in such cases, may also specify any items in the account as to which he supposes the sentence or decree is erroneous, as against him and in favor of the appellant. And upon the hearing of the parties upon such appeal, the sentence or decree of the Orphans Court may be modified, as to any such items, in the same manner as if a cross-appeal had been brought by such respondent. On an appeal from the sentence, order, or decree of an Orphans Court, or proceedings of a surrogate, the appellant, after the petition of appeal and the transcript of the proceedings in the court below have been filed with the register, may have an order of course that the respondent in the petition of appeal answer the same within twenty days after the service of a copy of the petition of appeal and notice of the order, or that the appellant be heard *ex parte*. And where the respondent is an adult, upon filing an affidavit of such service upon the proctor of the respondent, if he has appeared either in this court or in the court below, by a proctor of this court, or upon the surrogate, if he has not appeared by such proctor, and that no answer to the petition of appeal has been received, the appellant may have an order of course, that the appeal be heard *ex parte*, as against such respondent. Where the respondent is a minor, if he does not produce a guardian *ad litem* upon the appeal, to be appointed within twenty days after the filing of the petition of appeal, the appellant may apply to the Ordinary *ex parte* for the appointment of such guardian. And if the minor has appeared by his guardian *ad litem* in this court, the appellant may have an order of course that the guardian *ad litem* of the respondent answer the petition of appeal within twenty days after service of a copy thereof, and notice of the order. When a petition of appeal is filed, if it has not been served on the adverse party, the respondent may have an order of course that the appel-

lant deliver a copy of the petition of appeal to the proctor or to the guardian *ad litem* of the respondent within ten days after service of notice of such order, or that the appeal be dismissed; and if the same is not delivered within the time limited by such order, the respondent, upon due notice to the adverse party, may apply to the Ordinary to dismiss the appeal with costs.

III...OF APPLICATIONS FOR DIVISION OF REAL ESTATE.

1. All applications to the Surrogate General for the division of real estates shall be by petition, and the allegations of the said petition shall be verified by affidavit; and four weeks' notice in writing of the intended application shall be served on all the parties concerned in such real estate who shall not join in the said petition and shall reside in this state, or on the guardians or fathers of such of the said parties as are minors, and who shall reside in this state: and in case any of the said parties to be notified as aforesaid shall reside out of this state, or cannot be found therein, the application shall be advertised for thirty days, in such public newspaper or newspapers as the Surrogate General shall direct, before persons shall be appointed to make division of the estate; but in case notice shall be served, as aforesaid, on the parties not resident in this state, the publication, as aforesaid, shall be unnecessary.

2. The persons appointed to make division of any real estate, as aforesaid, shall, before they proceed to make such division, be severally sworn or affirmed, as the case may require, that they will honestly, faithfully, and impartially execute the trust reposed in them, and make division of the estate to the best of their skill, knowledge, and judgment.

3. A report of a division of real estate, made to the Surrogate General at the next Prerogative Court after such division, shall not be approved of and made conclusive until four days after such report shall be made to the court, if the said court shall sit so many days after the making of the said report.

IV...OF THE REGISTER AND SURROGATE.

The register of this court, and the surrogate of each county, shall have full power and authority to take affidavits and depositions to be used in this court; and every affidavit and deposition which shall be made or taken before the register, or before the surrogate of any county in this state, shall and is hereby declared to be as good and effectual, to all intents and purposes, as if the same were made or taken before the Ordinary himself.

V...OF PRINTING EVIDENCE ON APPEAL.

In case of appeal to the Prerogative Court from a sentence or decree of the Orphans Court on a *caveat* put in against proving a will, the party appealing shall cause the evidence which has been reduced to writing in the court below to be printed, and shall deliver a copy thereof to the Ordinary, and also to the opposite party, at the time of the hearing the appeal, and on failure thereof the appeal shall be dismissed.

A FURTHER SUPPLEMENT

TO THE ACT ENTITLED, "AN ACT RESPECTING THE COURT OF CHANCERY."

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That the complainant may, in any bill in Chancery, pray that the defendant answer without oath; in which case the answer need not be sworn to, and the allegations and statements therein, whether responsive or not, shall not be evidence against the complainant, except on motion to grant or dissolve an injunction, on which motion the statements and denials in an answer, duly sworn to, shall have the same effect as heretofore; and when an answer without oath is so prayed, the complainant may annex to the bill interrogatories, founded on statements in the bill, and the same or any part thereof may be addressed to all or any of the defendants; and each defendant to whom such interrogatories are addressed shall answer the same, under oath or affirmation, fully, directly, and responsively, confining the answer to the interrogatory proposed; and such answers shall be annexed to the answer to the bill, be filed therewith, and be liable to be excepted to as a part of the answer, and so far as responsive to such interrogatories, shall have the same effect as the responsive allegations in answers required to be sworn to; and any defendant omitting to answer any such interrogatory directly and fully may be compelled so to do, or the allegations in the bill upon which the interrogatory is founded shall be taken as admitted to be true, and a decree made thereon accordingly; but nothing in this section shall affect any suit now pending, or any suit to be brought upon a claim for which a suit in equity is now pending.

2. *And be it enacted*, That in lieu of the order to appear and plead, answer or demur, required to be published or served on absent defendants, the Chancellor may direct such

notice as he may by rule adopt, to be served or published in the same manner as such order is now required to be served or published.

3. *And be it enacted*, That when any defendant shall by law be taken or deemed an absent defendant, a copy of the order or notice to appear and plead, answer or demur, shall, within the time required by law, be served upon him or published, as now required by law, and mailed to him, prepaid, directed to him at the post-office nearest his residence, or the post-office at which he usually receives his letters, unless such residence or post-office is unknown, and cannot be ascertained upon making such inquiries as the Chancellor may by rule prescribe in such case; and no decree shall be made against an absent defendant not appearing or served with process in any suit hereafter commenced, unless upon proof filed of the actual service of such notice upon such defendant personally, or by leaving the same at his residence with a person of the family, or of due publication thereof, and the mailing the same to him as herein required, or, in default of such mailing, that his residence or post-office cannot be ascertained.

4. *And be it enacted*, That any defendant upon whom such order or notice is served, as herein directed, shall be bound by the decree in such cause as if he were served with process within this state; but in cases where the same shall be published and sent by mail, if such defendant shall make oath that he did not receive the same, and that it did not in any way come to his knowledge within twenty days after the time within which it was directed to be served, or in cases where actual service is sworn to, if it shall be made to appear by satisfactory proof that such service was not made, then the decree against such absent defendant shall have the same force and effect as it had before the passage of this act.

5. *And be it enacted*, That the proof of the service required by this act may be taken before any judge of any court of record, or any notary public, in any state or territory of the United States; and in any foreign state or country, before any notary public or any minister, secretary of legation

charge d'affaires, consul or vice-consul of the United States, there being.

6. *And be it enacted*, That the solicitor shall be entitled to one dollar and fifty cents for every notice served or mailed as directed by this act.

7. *And be it enacted*, That to every subpœna *ad respondendum* a notice shall be added that the defendant is not required to appear at Trenton in person at the return day, but only to cause his written appearance, to be sent by solicitor or otherwise, and to answer the bill within the time required by law.

8. *And be it enacted*, That in case of sickness of the Chancellor, or his temporary absence from the state, he may, by order filed with the clerk, authorize such master in chancery, as may be therein named for that purpose, to grant and dissolve injunctions, and perform such other duties of the Chancellor as may be therein designated, not including the final hearing and determination of causes; and all orders and acts of such master within the scope of such authority shall have the same force and effect as if made and done by the Chancellor in person.

9. *And be it enacted*, That when the amount due on any decree in chancery for the foreclosure and sale of mortgaged premises shall be paid and satisfied in any other way than by a sale of the mortgaged premises, or when any decree in chancery for the payment of money shall be paid and satisfied, satisfaction shall be entered on the margin of the enrollment by the party receiving satisfaction, or his solicitor, or by the clerk, by virtue of a warrant of attorney from the party, duly acknowledged or proved in the same manner as satisfaction is entered of judgments at law; and upon filing an acknowledgment of such satisfaction under the hand of the solicitor of any party, such satisfaction may be entered for him by the clerk; and the same fees shall be paid as in the Supreme Court for like services.

10. *And be it enacted*, That any trustee heretofore appointed or substituted, or who shall be appointed or substituted by the Court of Chancery in the place of trustee or trustees appointed by a will or other instrument creating or continu-

ing a trust, shall have the same power to sell and convey lands and other property as was given to and vested in the original trustee or trustees by such will or instrument, even in cases where such power may be directed to be exercised at the discretion of such original trustee or trustees, unless such power of sale shall, by such will or instrument, be expressly prohibited to any substituted trustee.

11. *And be it enacted*, That this act shall take effect immediately.

Approved March 6, 1867.

Additional Rules of the Court of Chancery,

ADOPTED AT MARCH TERM, 1867.

XXXI...OF ABSENT DEFENDANTS.

145. In lieu of publication or service of the order for absent defendants to appear and plead, answer, or demur to the bill, there shall be published or served a notice substantially of the form herein prescribed. But until the first day of May, 1867, it shall be optional to serve or publish such notice or the order as heretofore.

146. Such notice shall be entitled in the court only, not in the cause, shall be addressed to the absent defendants by name, shall state the date of the order, the name of the complainant, and the time within which the absent defendants are required to appear and plead, answer, or demur. The notice shall also state briefly, in general terms, the object of the suit, and why the persons to whom it is addressed are made defendants; and in foreclosure suits state the parties to the mortgage to be foreclosed, the date thereof, and the township and county or incorporated city in which the lands are situate. Such notice may be in the form in the schedule hereto annexed, or similar form adapted to the case; and it shall be signed with the name and post-office address of the solicitor of the complainant, or of the complainant, if he has no solicitor, and the mailing of such notice in the manner herein directed shall be service thereof.

147. The complainant or his solicitor, or his agent actually intrusted with the management and conduct of the suit shall, in all cases where the residence and post-office address of an absent defendant not actually served with the notice or order to appear shall not be known, make diligent and careful inquiry therefor. Such inquiry shall, as to persons made defendants for having a judgment, attachment, or decree, include

inquiry of his attorney or solicitor in such judgment, attachment, or decree, if residing within this state, and as to persons made defendants by reason of any mortgage or contract stated in the bill, shall include inquiry of the person who made the mortgage or contract, if known and residing in this state; and in any suit for divorce, such inquiry shall be made of the nearest relatives of the defendant, not more remote than brother, residing in this state, if known: such inquiries may be made in person or by letter, and shall state that a suit has been commenced against the person inquired for, and that the object of the inquiry is to give him notice of such suit, that he may appear and defend it; and when made by letter shall enclose a proper postage stamp for return of an answer.

148. No decree shall be taken *pro confesso* against an absent defendant not appearing or served with process, or a copy of the order to appear or the notice prescribed by the rules, unless, in addition to the publication of such order or notice required by law, it shall appear by proof that such notice has been mailed prepaid, addressed to him at his proper post-office address, or unless it shall appear, by the affidavit of the complainant or his solicitor, or the person actually intrusted with the management and conduct of the suit, that inquiry has been made in good faith and without success for the post-office address of such defendant, in the manner required by these rules, and in such other manner as the affiant supposed would probably give information thereof, if the same could be had.

XXXII...OF PARTITION WHEN SOME OWNERS ARE UNKNOWN.

149. In proceedings under the act entitled "An act for the partition and sale of real estate where some of the owners are unknown," approved March 25th, 1863, the provisions of rules 145, 146, 147, and 148 shall not apply, but the order itself shall be published in the manner directed by that act. And in all such cases, before any order is made to proceed against the owner of any share as an unknown owner, it must appear by proof to the satisfaction of the Chancellor,

that diligent inquiry has been made in good faith for the name and residence of such owner, by inquiry made of all such of the original tenants in common as may be known and reside in this state, and of such relatives of the last owner in severalty, not more remote than first cousins, as may be known and reside in this state. And the bill in such case shall show and set forth, so far as can be ascertained by diligent inquiry, the name and residence of the original tenant in common through whom such unknown owner derives title, and how the title passed from him, and trace the same to the unknown owner; and the order to appear shall state the name of such original tenant in common, and his heirs and assigns through whom the title passed, so far as traced.

The within rules are adopted and declared to be rules of the Court of Chancery of New Jersey, this 12th day of March, 1867.

A. O. ZABRISKIE,
Chancellor.

SCHEDULE TO RULES 146, 147, and 148.

I....NOTICE TO ABSENT DEFENDANTS.

IN CHANCERY OF NEW JERSEY.

To C. D., E. F., J. K., L. M., and R. S.

By virtue of an order of the Court of Chancery of New Jersey, made on the day of the date hereof, in a cause wherein A. B. is complainant, and you and others are defendants, you are required to appear and plead, answer or demur, to the bill of said complainant, on or before the —— day of —— next, or the said bill will be taken as confessed against you.

The said bill is filed (*to compel the specific performance of a contract made June* 11, 1864, *by the defendant, C. D., with the complainant, to convey to him a house and lot in the*

township of L——, in the county of B——; and you, E. F., are made defendant because you have since taken a lease of said house); or, (*for partition of certain lands in the township of F., in the county of L., of which G. V. died seized; and you, G. F., are made defendant because you hold a mortgage, given by one of the tenants in common, upon his estate therein, and you, H. S. V., are made defendant because you are one of the tenants in common therein*); or, (*against you for a divorce from the bond of matrimony*); or, (*against you for a divorce from bed and board*); or, (*against you by the complainant, as your wife, for proper alimony and maintenance*); or, (*to foreclose a mortgage given by E. F. and wife to G. H., on lands in the city of Newark, dated May* 4, A. D. 1863; *and you, J. K., L. M., and R. S., are made defendants because you hold encumbrances on said lands; you, C. D., are made defendant because you own said lands, or some part thereof; and you, E. F., are made defendant because the bill prays a decree against you for any deficiency there may be of the proceeds of said lands to pay the mortgage debt*).

Dated April 20, 1867.

A. S. J.,
Solicitor of complainant, Exchange Place, Jersey City, N. J.

II...PROOF OF INQUIRY FOR RESIDENCE.

IN CHANCERY OF NEW JERSEY.

Between

A. B., complainant,
and
C. D. and others, defendants.

On bill.

New Jersey, *ss.*—T. W., being duly sworn, on his oath saith—that he is the (*person actually intrusted with the management and conduct of this suit on part of the*) complainant (*in this suit*); that he has in good faith and diligently made inquiry for the residence and post-office address of C. D., one of the defendants; (*and that he is credibly*

informed, in such manner that he believes it to be true, that said C. D. resides in the city of Rochester, in the state of New York, and that his post-office address is "Rochester, N. Y.," and that this deponent did, on the 16*th day of June,* 1867, *place in the post-office in the city of Trenton, a letter directed to the said C. D., at "Rochester, N. Y.," with the postage prepaid, containing a copy of the notice hereto annexed,*) or, (*as well in the manner directed by the rules of this court relating thereto as in every other way by which he thought it probable that he could ascertain such residence or address, and that he has not been able to discover, and has no information as to the residence or post-office address of said defendant*).

INDEX.

See ORPHANS COURT, 1, 2.

ASSETS.

COMMISSIONS.

See EXECUTORS AND ADMINISTRATORS, 7.

CONTRACT.

See AGREEMENT.

CONVERSION OF REAL ESTATE INTO PERSONAL.

See WILL, 4 to 8.

CORPORATION.

1. The Sussex Zinc Company agreed, under seal, to transfer to the New Jersey Zinc Company all their stock and all their property, real and personal. Both parties applied to the legislature, and procured an act authorizing it to be done. Under the agreement and act, the Sussex Company transferred to the other company all its stock, 21,849 shares, not issued to individuals, and all its stockholders transferred all their shares, 26,151, and the New Jersey Zinc Company issued a like amount, 48,000 shares, of their own stock in payment. A year afterwards, while three of the directors of the Sussex Company had not yet transferred thirty shares out of the 48,000 to the Zinc Company, they applied to the legislature, and got the name of the Sussex Company changed to that of the Franklinite Company, and 48,000 shares of additional stock, and then also transferred the said thirty shares of old stock.

   Held, 1st. That, by these proceedings, the New Jersey Zinc Company became entitled in equity to all the property owned by the Sussex Company at the time of the transfer of the stock, and that Chancery will protect the former in its use. *The New Jersey Zinc Co.* v. *The Boston Franklinite Co.*, 418
2. 2d. That the Franklinite Company, as regards the property owned by the Sussex Company at the time of said transfer of stock, is a new corporation, and as such has no title, either equitable or legal, to the property the Sussex Company had so agreed to convey. ib.
3. 3d. If the Franklinite Company is not a new corporation, but the Sussex Company under a new name, then the increased stock, as well as the old stock, belongs in law and equity to the Zinc Company, as owners of the old stock. ib.
4. The complainant was the owner of a farm, through which the defendants, the Morris and Essex Railroad Company, in the construction of their work, made an excavation. Commissioners were called, under the company's charter, to assess the damages, from whose award the complainant appealed. Before the hearing of the appeal, H. and W., who had contracted with the company to procure the right of way for them, and to pay the expenses of it, proposed to submit the matter in difference to arbitration, which was done. By the charter of the company, they were obliged to construct and keep in repair suitable

COSTS.

See EXECUTORS AND ADMINISTRATORS, 13; WILL, 16, 48.

CREDITOR.

DEATH.

DEED.

DEMURRER.

DIVORCE.

DOMICIL OF INTESTATE.

See EXECUTORS AND ADMINISTRATORS, 1 to 6.

DOWER.

EASEMENT.

EQUITABLE ASSIGNMENT.

ESTATE.

ESTOPPEL.

EVIDENCE.

1. Where a bill is filed to avoid a deed, on the ground that it was never delivered to the grantee, but was fraudulently and clandestinely taken from his possession, and the defendants (the heirs of the grantee) have no personal knowledge of the delivery of the deed, and can only answer as to their information and belief, and the answer contains no positive denial of the fact which is distinctly alleged and charged in the bill, and therefore not evidence in the defendant's favor upon that point, the complainant is not required to increase the weight of his evidence to overcome the answer. *Benson* v. *Woolverton*, 158
2. The fact of the possession of a deed by the grantee, duly executed and acknowledged by the grantor, is presumptive evidence of the delivery of the deed at the date of the acknowledgment. That presumption is to be overcome by counter evidence of superior weight. The uncorroborated evidence of the grantor is not sufficient for that purpose. ib.

EXECUTION.

EXECUTORS AND ADMINISTRATORS.

1. J. A. M., domiciled in New Jersey, died intestate. Letters of administration on her estate were granted to the complainant, in the place of the domicil of the intestate. The defendant, a brother and one of the next of kin of the intestate, obtained possession of some of the personal property of the deceased, consisting of bonds and stock of the Buffalo, New York, and Erie Railroad, a bond of the New York and New Haven Railroad Company, and a note or notes of a brother of the intestate, who resided in New Jersey, and procured administration of the personal estate of the intestate to be granted to him by the surrogate of the city and county of New York. Complainant filed his bill in this court against the defendant alleging the above facts, and also that defendant had received other considerable sums of money in

FOREIGN ADMINISTRATION.

FRAUD.

HUSBAND AND WIFE.

JURISDICTION.

See APPEAL, 1, 2, 3, 15; DIVORCE, 5, 6; DOWER, 1 to 4; EXECUTORS AND ADMINISTRATORS, 1 to 6.

MARSHALLING OF SECURITIES.

MECHANIC'S LIEN.

MISTAKE.

SALE OF LAND.

SHERIFF'S SALE.

SPECIFIC PERFORMANCE.

STATUTES.

SURETY.

TESTAMENTARY CAPACITY.

TRUST AND TRUSTEE.

ERRATA.

In last head note to Kirrigan *v.* Kirrigan, page 147, in the last line, for "*granted*" read "*quashed.*"

In head note No. 7, to N. J. Zinc Co. *v.* Boston Franklinite Co., page 419, in last line, for "*read*" substitute "*made,*" and for "*contracted*" read "*intended.*"

In head note No. 1, line 2, to Mount *v.* Mount, page 162, omit the word "*that.*"

In head note No. 5, line 1, to Smith *v.* McChesney, on page 360, for "*inoperative*" read "*imperative.*"

In head note 3, line 3, to Van Winkle *v.* Schoonmaker, page 384, for "*caveat*" read "*consent;*" same case, 5th head note, line 1, for "*parol*" read "*part.*"